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REPORTS

OF

CASES ARGUED AND ADJUDGED

IN THE

Court of Appeals of Maryland.

WILLIAM T. BRANTLY,

STATE REPORTER.

VOLUME 112.

CONTAINING CASES IN JANUARY TERM, 1910.

Published by Authority.

**BALTIMORE:
KING BROTHERS,
1910.**

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For the State of Maryland

SEP 15 1910

NAMES OF THE JUDGES, ETC.

DURING THE PERIOD COMPRISED IN THIS VOLUME.

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IN MEMORIAM.

COURT OF APPEALS,

March 2nd, 1910.

During the session of the Court today the following proceedings were had:

ATTORNEY-GENERAL STRAUS said:

May it please Your Honors: In the death of William Pinkney Whyte and John Prentiss Poe, the People, the Bench and the Bar of Maryland have been afflicted with sad, irreparable loss.

If we remembered naught but the precious and cherished ties which bound us personally to them, we had rather bear our loss in silence than in speech. And if personal sorrow possessed *us only*, we fain would bow our heads, voiceless and unheard, for like the grief-filled and distracted Prince, we "have that within us which passeth show."

But when great men, loftily stationed in service of the State and, for a time, the very Ministers of its Justice, are summoned hence and their demise occasions general and public mourning, then, *more majorum*, it is fitting that we speak in the public forum in sympathy and condolence with one another, and in commemoration of the genius and the virtues of the dead, and in acknowledgment of the bereavement of the State, and so give outward and enduring form to our own as well as to the common feeling. It is with such sentiments that this representation of the Bar is assembled before Your Honors today to memorialize in its impressive and authentic tones the respective characters and public services of our late pre-eminent and lamented brethren.

Though months have passed since the parting of William Pinkney Whyte, it is hard—most hard—to realize that he is gone. We feel as keenly now as we felt in the very quick of our grief at the first intelligence of his death that a great Champion and Warrior in the cause of Justice and Humanity has been taken from his high exploits, and we lament him as Tennyson lamented Wellington in the mournful lines which interpreted the heart of England—

"Oh, good, gray head that all men knew,

Oh, iron nerve to true occasion true;

Oh, fallen at length, that tower of strength,

That stood four-square to every wind that blew."

For fifty years, Governor Whyte was one of the great and powerful figures at the Bar and in the public life and history of the State. At the age of twenty-three, as far back as 1847, he began his public life with a term of service in the General Assembly, and from that occasion until his death he was almost constantly in the most responsible political offices of the Government. He was Comptroller of the Treasury, thrice a Senator in Congress, Governor of Maryland, Mayor of Baltimore, City Solicitor of Baltimore, Special Counsel for the State in various important employments, and, from 1887 to 1891, Attorney-General of the State. In all these official occupations, he served the People of Maryland with fidelity, ability and power never surpassed by anyone in the whole, long line of our illustrious men. As Senator, Governor and Attorney-General, he was an ideal Magistrate.

Through all these years of public labor, he never, except while Governor and Mayor, abated the active and arduous practice of his profession. To his greatness and accomplishments as a lawyer and his achievements at the Bar, no more than a passing reference may be made here. Apart from his marvelous successes at *nisi prius*, as you go back through one hundred volumes of the Maryland Reports; you find the proud record of his triumphs and trophies in this Court. His pre-eminence and success in his profession, his matchless power with the people sprang greatly from his abilities, but even far more from his character. His *conscience* was his guide omnipotent, and he knew nothing but a *rectitude* and *honor* which kept the faith with an unslumbering vigil and an unfaltering devotion. His political creed—his “democracy,” we called it—was a deep, true devotion to the masses of mankind as his brethren. The people knew this and they loved and trusted and requited him as they did no other man. As an orator before the jury he was, I think, without a peer. In his relations with the Bench and Bar, he was the soul of honor and courtesy.

He fulfilled all the high purposes of his earthly mission—until the time came for his labors to cease and his rest to begin. And then, with those whom his heart most tenderly cherished at his side, with his great faculties undimmed, his temples fresh wreathed with the highest honors his people could bestow, conscious of the esteem and affection with which they clung to him, and in the arms of the Church he loved, his eyes closed upon this world to greet the eternal light.

His memory shall remain among the most precious civic and moral treasures of Maryland.

"Nothing can cover his high fame but Heaven;

No pyramids set off his memories

But the eternal substance of his greatness."

Whilst our inconsolable hearts were still bleeding from the deep wound of Governor Whyte's death, another illustrious Marylander, also wearing the high honors of the State and the highest honors of the profession—John Prentiss Poe—was called to his home beyond the skies—leaving here another void incapable of repair.

Few men have ever lived in any State who touched the political, legal and juridical life of the community as deeply and enduringly as did John Prentiss Poe that of Maryland.

In the public counsels of the Commonwealth he was untiring, sagacious and potent.

As Attorney-General from 1891 to 1895, he was a model of courtesy, dignity, legal acquirements and devotion to duty.

In the records of this Court, going back for half a century and through almost a hundred volumes of its printed Reports are his elaborate, learned, solid briefs, constituting in themselves a system of jurisprudence—a majestic pile and fabric of legal architecture.

From one end of Maryland to the other, from the most youthful members to the leaders of the Bar, the profession of this State is, with but a few notable exceptions, substantially made up of his erstwhile pupils, who every hour are offering to Judges and to clients the treasures of learning they acquired from him.

The light of his great works upon the science of pleading and practice is not only the lamp and guide of the Bar, but shines and gleams in immortal rays upon the pages of nigh half the extant decisions of this venerable and august Court.

In the proceedings of the associations of the Bar, none was so dutiful, active and influential as he.

In the field of legislation, upon legal, administrative and political matters, his was the gifted and master hand which drafted almost all the important statutes of his day and generation.

And in the equally useful field of codification, his prodigious works are monuments and marvels of order, system, accuracy and thoroughness and the everlasting testimonies of the ineffa-

ble obligations of the Bench and the Bar of this State to the industry, patience, devotion and genius which gave him an unrivalled and incomparable place in the perfect mastery of that invaluable art.

The whole polity of Maryland—every function and process of its organic life as a State—bears today and shall bear forever the deep indelible impress of his versatile and masterful mind.

But great and wonderful as all this was, Mr. Poe had within him something else, Your Honors, which was yet greater and more wonderful. His heart—his heart was cast in the unalloyed gold of charity and kindness for all his fellows. If he had marked talents, so many others have had. If he toiled without cessation, many men have done likewise and won success. Neither is hard-achieved erudition the exclusive treasure of a few. And many, too, by application and will and force have climbed “the steep ascent where Fame’s proud Temple shines afar.” But *few, very few*, if Your Honors please, have been able to live as Mr. Poe lived, absolutely without resentments, forgiving those who wronged and injured him, speaking ill of no fellow-being and passing through every trial and vicissitude in the divine spirit of love and charity for mankind. It was in this, above all else, that he was supremely great.

If Your Honors please, the fame of William Pinkney Whyte and John Prentiss Poe shall never die in Maryland. The influence of their genius and their works shall go on, and still go on as an inspiration and example to every succeeding generation at the Bar. And as each generation is brought forward by time to meet its own peculiar tasks and responsibilities, and in meeting them seeks strength and guidance from the great men who have gone before, William Pinkney Whyte and John Prentiss Poe shall be among the very foremost of those whose memories shall make

“The heart run o’er
With silent worship of the great of old,
The dead but scepter’d sovereigns who still rule
Our spirits from their urns.”

May it please the Court, I respectfully move that Your Honors may direct the memorial proceedings upon this occasion, together with such other minutes as the Court may deem appropriate, to be entered upon its Records.

CHARLES J. BONAPARTE, Esq., said:

William Pinkney Whyte had so long and so eventful a career as a public servant and as a member of this Honorable Court that I deem it needless to speak here and now of his history, which for so many years was also the history of Maryland, or of his services to our State, to its great City and to the Nation. All that hear me know of his professional eminence, and others may speak with a better claim to be heard than mine of his personal traits, of his private life as a citizen and as a man. I venture to say here, as I said to his brethren of the Baltimore Bar when his loss was recent, a very few words as to his death.

He died at work. Although he had reached an age when few lawyers are such except in name, when the great majority of men live in the memories of past labors and muse on the toil of many days in the repose of life's evening, he worked for the clients he served at this Bar and before lesser tribunals, he worked for the State he served in the Senate of the Union, as faithfully, as earnestly, as industriously, as he had worked in the days of his youthful vigor, or as any advocate, as any servant of the people, whether young or old, has worked or could work. It happened that, so long as the Congress was in session and while, for the last time, he served as Senator, I journeyed with him often, at times daily, to and from Washington; for he sought to discharge to the full his duties as one of the Nation's lawgivers and yet to keep his home in his and our State, the home where he had lived long, and about which clustered his memories and his affections. To my mind, his interest in public affairs was none the less lively, his grasp of public questions was none the less intelligent because he had lived so long and known so much; he had earned the wisdom of old age and yet escaped its wonted cost, for he was still strong, at least in seeming, and hopeful and confident of life's continued worth. Every worthy member of our common profession would die, as he died, in his harness, useful and unwearied at his post of duty, awaiting there that final message which should bid him lay down the tasks God had given his hands to do, and rest at last, with the knowledge that his work was well done.

BERNARD CARTER, Esq., said:

In taking part today in the Memorial exercises in this Court in commemoration of the Honorable John Prentiss Poe, I feel

that I cannot more appropriately discharge this function than by reading to the Court, with its leave, the Memorial Minute of him prepared by a Committee of the Bar of Baltimore City, with the Chairmanship of which I was honored, and adopted at a meeting of that Bar, the fullest within my recollection, held a few days after his death.

This Minute being included among the proceedings of this Court, and printed in one of the Volumes of its Reports, the members of the Bar of Maryland and the Bars of other States, will from it learn of the great esteem and affection felt for him by that large part of the Bar of Maryland represented by the Bar of Baltimore whose members knew him so well.

MEMORIAL MINUTE OF THE BAR OF BALTIMORE CITY IN RELATION TO THE DEATH OF THE HONORABLE JOHN PRENTISS POE.

It is with heartfelt sorrow and a deep sense of the loss sustained by the City of Baltimore and State of Maryland that the Bar of Baltimore pauses, in its daily duties, to pay a memorial tribute to the professional abilities, the public services and the private virtues of John Prentiss Poe, whose long and conspicuous career has just ended.

Whether judged by the remarkable success and distinction, so strikingly evidenced, among other things, by the Maryland Reports, with which he pursued the ordinary tenor of a busy professional life, or by the reputation that he won as City Counsellor and Attorney-General of Maryland, or by his lectures in the Law School of the University of Maryland, or by the codifications and treatises which have done so much to facilitate the administration of justice in our Courts, he was truly, in every sense of the word, an eminent lawyer.

In his professional character were united elements not often so happily blended. Alert, adroit, resourceful, brilliant, eloquent, gifted with a promptitude of insight and utterance, which rendered him a most effective trial lawyer, he was yet capable of bringing to even the dreariest tasks of the codifier or compiler the plodding, invincible industry required for their proper performance.

An ardent student as well as practitioner of the law, twice the codifier of the Public General Statutes of the State, the codifier of its Public Local Statutes, the Codifier of the Ordinances of the Mayor and City Council of Baltimore, a professor in the

Law School of the University of Maryland, the author of several valuable legal treatises, he came day by day to the service of his clients with a mass of solid and varied learning such as has rarely been equaled in our midst.

Extraordinary, however, as was the extent of this knowledge, even more extraordinary was the ease with which it was used. Alike in the studious seclusion of his library, and in the most abrupt vicissitudes of the trial table, his memory, little less than a marvel of tenacity, had all its hoarded stores ready for serviceable use at any moment.

It is rare that a lawyer, however gifted, is at once a patient, accurate codifier, a luminous lecturer and text-writer, a sound and safe counsellor, a powerful and brilliant advocate, strong with both Court and jury; but all this our deceased associate was. In his intellectual equipment for the innumerable forensic contests, in which he was engaged, during his protracted career, was found a singularly felicitous illustration of the truth of the weighty and familiar saying of Lord Bacon: "Reading makes a full man, conversation a ready man, writing an exact man." That this is not indiscriminating panegyric anyone will testify who ever heard him at his best, when he was lavishing upon some important cause his overflowing measure of treasured knowledge, and his powers of statement, reasoning, sarcasm and eloquence, all in a diction copious and exact, instinct with the best inspirations of literary culture, and unfailingly smooth and fluent in its "full-throated ease."

Nor can the Bar fail to record the thoughtful, genial kindness and helpfulness, which made every young man, who ever studied law in his office, his lifelong friend; the habitual deference that marked his relations to the Bench, the courtesy to his professional antagonists which stood the shock of so many strenuous conflicts, the scrupulous sense of honor that characterized his professional conduct.

As a School Commissioner, as a member of the various Tax Commissions, as a State Senator, as a lecturer at the Law School of the University of Maryland, as the Dean of its Faculty, as the Secretary of the Board of Regents of the University of Maryland, as City Counsellor, as Attorney-General, he performed services of great importance to the public.

Not the least important of all his contributions to its permanent welfare was the impress of his vivid and enlightening instruction upon those bands of bright, hopeful, aspiring young

men, who, year after year, and decade after decade, issued from the portals of the Law School of the University of Maryland.

The prompt and universal consent with which he was accorded the undisputed leadership of the State Senate, when a member of that body, the facility with which he commanded the respectful attention of his colleagues and of the country, when a trying task was imposed upon him by a Presidential Convention, showed how easily, but for personal and family reasons which he was not at liberty to disregard, he might have secured for himself the higher results of national prominence.

He was a tender and devoted husband, a loving and sympathetic father, a constant and loyal friend. His brave, cheerful spirit, quiet fortitude, and unflinching integrity, bore him not only undaunted, but unmurmuring, through the many anxieties and responsibilities of his arduous life.

A devout Churchman, he died feeling that underneath were the Everlasting Arms.

EDGAR H. GANS, Esq., said: .

Governor Whyte, as his friends loved to call him, was one of the most conspicuous figures in Maryland for over half a century. He would be distinguished if only for his rugged personality and amazing physical and mental vitality, which enabled him, when over eighty years of age, to display his great forensic powers in the Senate and the Courts with scarce an indication of failing faculties. And yet withal, in private and domestic life, he was gentleness and simplicity itself. I do not propose to deal with his many-sided character. That has been done by others. It is of him as a lawyer that I desire to say a few words.

It is said that the law is a jealous mistress. This is true as to some phases of the law. One cannot be much in public life and expect to acquire and retain an exact knowledge of those legal principles which require assiduous and exclusive attention. In the field of technical law, therefore, Governor Whyte was not pre-eminent. But in the broad field of law which directly touches human nature and fundamental rights, he was a master, and a great one. Men are seldom really controlled by logic and exact reasoning. Their opinions are formed from many complex causes. Feelings, passions, prejudices, environment, training—all go to form the convictions of the average

man. Put men of this kind on a jury—have tried before them an accusation of crime, or some question of substantial justice between man and man, or some essential political right—before such a tribunal and on such questions Governor Whyte had no superior.

With unerring instinct he divined the attitude of the mind of the average juryman; led him along with consummate skill to his side of the case; illumined the way with flashes of brilliant wit, and then clinched the argument with a torrent of passionate eloquence.

He knew human nature; he could run the gamut of human emotions in semi-tones, and was equally forcible before Court and jury on the broad questions of right and justice.

He was a hard, conscientious worker. He did all the work himself, writing out all his arguments and law papers in a clear, firm, beautiful hand.

He will always be remembered as one of the great lawyers of Maryland.

ARTHUR GEO. BROWN, Esq., said:

May it please the Court: By the compelling force of a great and original genius, one of our Maryland family names has become familiar to readers of every modern language, and has earned the blazonry of world-wide distinction.

To the fame of that name our brother, John Prentiss Poe—whose absence we shall always lament and whose memory we especially honor today—has added lustre.

With entire truth and without exaggeration we can say, reviewing his professional life as a whole, and having regard to all of its comprehensive labors and activities, that he was, in his day, of the entire jurisprudence of Maryland *pars magna*.

A few of his contemporaries may be ranked beside him in one or more departments of our profession; but the universality of his attainments and proficiency was unequalled.

For us, Mr. Poe constituted the single exception that proved the rule, *non omnia possumus omnes*.

His works and labors, and his record as an eminent practitioner, writer and teacher of law constitute his monument, built from the foundation up by his own skillful and unremitting hands.

But even more admirable than any of these was the abounding and unconquerable spirit of the man himself.

On a recent occasion, the foremost of living soldiers well said that the real test of a man's character consists in his ability to meet and bear gallantly the misfortunes that he encounters in life.

Our brother's life conspicuously set forth that truth.

"With a mien how high and joyous

* * * * *

Went he forth we know."

And how generous he was and how truly he loved, and with what constancy.

Mr. Poe himself saw fit to set before us lines which we are therefore entitled to read today.

Completing the labors incident to the latest edition of his work on Pleading, he added this dedication, which has now become also a valedictory: "To the Sustaining Encouragement that has never failed."

That is the final and abiding message of his life and character to us, "and by it he, being dead, yet speaketh."

Even if, as his words imply, that splendid sustaining courage was not altogether innate and was in part a benefaction, he, in his turn, right royally dispensed the richness of it to others. Wherever he went he lavished it.

The grasp of his hand, his greeting in passing upon the street, the unselfish inquiry about the welfare or interests of a friend—these and other like incidents of daily intercourse were made important and helpful and inspiring by his affectionate warmth, and by the convincing power of loving-kindness; and—consummate grace of all—habitually, because coming from a sympathetic heart and a charitable mind, his was the "kind word, so short to speak, but whose echo is through eternal ages."

CHIEF JUDGE BOYD said, on behalf of the Court:

Some years ago it was determined that it was best not to have public exercises in this Court in memory of deceased members of the Bar, as, unless it was done in all instances, some unwise, if not invidious distinctions might seem to be made. But when it is remembered that William Pinkney Whyte and John Prentiss Poe were not only distinguished

members of this Bar, but were Attorneys-General of the State, and hence closely connected with the Judiciary Department of our State Government, we are assured that the action of the Court in suggesting that these exercises be held will meet with the approval of the Bar, as well as of the State at large.

"Death hath so many doors to let out life" that when one had lived over four-score years and the other more than the allotted three-score years and ten, it is exceptional to be able to speak of each of two such as having been actively engaged in his life's work, until almost the very day on which the "silver cord was loosed."

Governor Whyte was peculiarly honored by his fellow-citizens. He was elected to the Legislature when he was twenty-three years of age, and as Comptroller of the Treasury before he was thirty. He was Mayor of the city of his birth, Governor of the State, Attorney-General, the head of the Law Department of Baltimore City under the new Charter, which he in part prepared, having been chairman of the Commission appointed to draft it, and was four times chosen to represent Maryland in the United States Senate—twice by Executive appointment and twice by the Legislature.

He discharged his public duties with signal ability, and great fidelity, in all of the above positions, but he loved his profession and displayed marked zeal in behalf of all who confided their interests to his care. He was never more eloquent or earnest than when he was advocating the cause of some humble or unfortunate person whom he believed had been wronged, or was in danger of having his rights encroached upon. We were often impressed with the thorough preparation of his cases in this Court. He was of the old school of lawyers, and did not adopt all of the modern helps we have. It was not unusual for him to have his brief supplemented by an argument, written in his own handwriting, which he freely made use of.

His habits and private life were exemplary, and he was the kind of man whom the young men of our profession could profitably keep in mind when looking for an example worthy of being followed, as an industrious, eloquent, faithful lawyer, as one who regarded a public office a public trust, and as a citizen who won the esteem and respect of his fellows.

Mr. Poe was perhaps more closely identified with our profession than any lawyer who ever lived in Maryland. He not only had an unusual experience in the practice of law, but he

was an instructor, an author and a codifier. Beginning with *Cooke's Lessee v. Kell*, 13 Md. 469, his name appears, as attorney, in every Maryland Report, with, I believe, but one exception, from that date (1859) to the present time—nearly one hundred volumes and covering a period of over fifty years.

Very many of the lawyers now at the bar received instruction from him, in the Law School with which he was prominently connected for forty years—some of his former pupils being now amongst the leading attorneys and Judges of the State. There has not been a practitioner or Judge in Maryland for more than a quarter of a century who has not received valuable aid from his most excellent work on Pleading and Practice. Those volumes are the trusted companions of Judges at *nisi prius*, and this Court has made constant reference to them since their publication. The author must have had a pardonable pride in the full realization of his hope, expressed when he dedicated the first volume, "In the earnest hope that it may afford acceptable aid to those who, from year to year, shall turn to its pages for guidance in one of the most difficult paths of their profession."

As he was codifier of the Codes of 1888 and 1904, members of the Bench and Bar have been in constant touch with the results of his labors so diligently devoted to our statute law. His frequent appearance in the lower Courts, as well as in this, together with other work connected with his profession, probably caused him to be more generally known than any other attorney in the State for many years. Although apparently always busy, he seemed to be ever ready to undertake new work. As School Commissioner, State Senator, City Counsellor, Attorney-General, and in other public positions, he discharged his duties faithfully and with marked ability, but always found time to devote to his private practice, and did not forget his duty as a citizen and at home. It has been truly said of him that he was "A man of marvelous energy."

His great knowledge of the law, his legal acumen, his vast experience and forensic ability, gave him a readiness at the trial table which was rarely equalled by his opponent. No client suffered from lack of preparation on his part, or loyalty to his cause. Although always courteous and good-natured, he was ever ready to battle for his client's interests. His adversary never won a victory over uncontested ground.

We naturally hesitate to speak publicly of the domestic life of another, yet no one who knew him well can fail to recall the beautiful life of Mr. Poe at home. Busy as he was, he gave and received great pleasure in the home circle. The paternal feeling so strongly developed in him may in part account for the great interest he manifested in the students and in the young members of the Bar, but, however that may be, he strikingly demonstrated the fact, that it is possible to accomplish great results in a profession and yet fully meet the sacred obligations due to one's own family. What we have said of the habits and private life of Governor Whyte applies equally to Mr. Poe.

Much more could be said in pointing out some of the striking characteristics of these two great lawyers, who did so much to sustain the well-deserved reputation of the Maryland Bar, but to do so would only be to repeat what has already been better said of them, here and elsewhere. As the standard of success, fixed by many of this day, is the amount of wealth accumulated, and especially as some even rate members of professions by their incomes, and not by their abilities and virtues, it is refreshing to see those who can be regarded as representatives of our profession subordinate the accumulation of dollars and cents to higher motives, as these two did.

Money has its place and can be honestly sought after and acquired, but no lawyer can hope to gain and retain the esteem of the members of his profession, as well as that of others, if his chief end be the acquisition of wealth. "Silver and gold are not the only coin; virtue, too, passes current all over the world."

We share with the members of the Bar the loss of Governor Whyte and Attorney-General Poe. The members of this Court have had the benefit of their ability and energy for many years. Chief Judge Alvey said, in replying to what had been so kindly said of him, by Attorney-General Poe and others, when he was about to retire from this Bench: "Whatever I may have been able to accomplish here, in my judicial capacity, as a co-laborer with my brother Judges, has been, in no small degree, due to the aid derived from the labors of the members of the Bar. Indeed, a Judge may be ever so willing and able to work, yet, without the aid of a learned and able bar, his work will most likely be but imperfectly performed. * * * I hope the high character of the Bar may for all time be maintained;

for upon that depends, in a large degree, the character and standing of the Court."

We heartily concur in what was then so well said, and realize that when we are deprived of the aid of two such useful members of the Bar as Governor Whyte and Mr. Poe, we have sustained a serious loss, but take comfort in the thought that the usefulness of such men does not perish when they die, "but lives though they are gone."

The Court will direct these proceedings to be recorded in its Minutes, and will now adjourn until 10 o'clock tomorrow morning.

MARYLAND REPORTS.

January and April Terms, 1910.

CROOK HORNER COMPANY *vs.* CHARLES GILPIN.

Attachment Against Person Adjudicated Bankrupt Within Four Months Thereafter—Discharge of Bond Given to Dissolve Attachment.

The Federal Bankrupt Act (sec. 67F) provides that all judgments, attachments or other liens, obtained against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudicated a bankrupt and the property affected by the attachment or other lien shall be deemed wholly discharged and released from the same. An attachment was issued against the defendant on December 19th, 1905, which was dissolved upon the filing of a bond by a surety on December 28th. On February 26th, 1906, the defendant was adjudicated a bankrupt and finally discharged in January, 1909. *Held*, that the plaintiff in the attachment is not entitled to ask for a judgment against the defendant with a perpetual stay of execution in order to be enabled to proceed against the surety on the bond given to dissolve the attachment, but that, under the terms of the Bankrupt Act, the attachment became void, since it was issued within less than four months before the institution of the proceedings in bankruptcy; that if tangible property had been attached it would have been released from the lien, and there is no reason why the bond, which stands in the place of property, should not also be released.

Decided January 12th, 1910.

Appeal from the Court of Common Pleas of Baltimore City (DOBLER, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE and THOMAS, JJ.

Robert H. Smith and J. Craig McLanahan, for the appellant.

Charles F. Harley (with whom was *John B. A. Whittle* on the brief), for the appellee.

BRISCOE, J., delivered the opinion of the Court.

The plaintiff sued out of the Court of Common Pleas of Baltimore City, on the 19th day of December, 1905, an attachment against the defendant, a non-resident of the State, to recover the sum of three thousand nine hundred and six dollars due and owing, for work done and materials furnished, in the erection of the heating apparatus, of the Hotel Caswell, Baltimore City.

The defendant appeared to the suit, and on the 28th day of December, 1905, a bond was filed by the Scranton Trust Company as surety, and the attachment was dissolved.

On the 26th day of February, 1906, the defendant was adjudicated a bankrupt by the District Court of the United States for the Eastern District of Pennsylvania, sitting in bankruptcy, and on the 11th day of January, 1909, by an order and decree of that Court was discharged from all debts owing by him and provable under the Bankrupt Act.

The declaration in the short note case is in assumpsit, and contains the usual money counts.

The precise question is presented on the pleadings and it arose in this way: The defendant, on the 28th day of December, 1905, pleaded to the declaration in the short note case the usual pleas of never indebted as alleged and did not promise as alleged, and issue was joined thereon.

On the 13th day of January, 1909, the defendant by leave of Court filed an additional plea to the declaration wherein he sets up and pleads his discharge in bankruptcy by a Court of competent jurisdiction from all his debts and that the ad-

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judication was upon a petition filed less than four months after the issuing of the attachment. In other words, it appears that the attachment was issued on the 19th day of December, 1905, and the decree in bankruptcy was passed on the 26th day of February, 1906, so it is clear that the attachment proceeding was begun against the defendant within four months before the commencement of the proceedings in bankruptcy.

To this plea of discharge in bankruptcy the plaintiff replied: "That the adjudication of the defendant a bankrupt, and his discharge in bankruptcy by order or decree of the United States District Court for the Eastern District of Pennsylvania, does not release or discharge the surety on the bond filed in this case by the defendant to dissolve the attachment which had been previously issued and levied by the plaintiff on the moneys and credits of the defendant, which bond had been executed and filed in the case before the filing in the District Court of the defendant's petition to be adjudged a bankrupt. That the judgment sought to be obtained in this case against the defendant is solely and exclusively to bind the surety in the bond filed to dissolve the attachment issued and levied on the moneys and credits of the defendant, and if a judgment is had in this case against the defendant, the Court will be asked by the plaintiff by its order to restrain the plaintiff from ever issuing an execution on said judgment against the defendant."

The defendant demurred to this replication and the Court below sustained the demurrer, and gave judgment thereon in favor of the defendant. And from this judgment the plaintiffs have appealed.

The validity of the plaintiffs' replication to the defendant's plea, it will be seen, must depend upon the effect to be given and the proper construction to be placed on sec. 67 F of the Bankrupt Act, 1898, *U. S. R. S.*, Vol. 30, page 565. The language of the Act, is to this effect: "That all levies, judgments, attachments or other liens, obtained through legal proceedings against a person who is insolvent, at any time within

four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudicated a bankrupt, and the property affected by the levy, judgment, attachment or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the Court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate aforesaid * * *, provided that nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment or other lien, of a *bona fide* purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

On the part of the plaintiffs it is contended that they are entitled to a judgment against the defendant with a perpetual stay of execution in order to establish a liability against the surety notwithstanding the fact that the bankruptcy proceeding was begun within four months after the attachment was instituted, because a bond was given to dissolve the attachment and the lien was released, before the proceedings in bankruptcy were commenced, and further, as no lien existed, when the petition was filed, there was nothing upon which the bankrupt law was to act.

On the other hand, the defendant contends that the proceedings in bankruptcy having been instituted within four months after the issuing of the attachment, that the Courts of this State, have no jurisdiction to enter up a qualified judgment, with stay of execution against the defendant, to bind the surety, because under the Bankrupt Act, *supra*, such attachment proceedings are declared to be null and void.

While the main question here raised has not been heretofore passed upon by this Court, it is, at least, answered in part by the recent case of *Kendrick & Roberts v. Warren Bros.*, 110 Md. 47. In that case, the plaintiff had issued an attachment against the defendant, which

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was dissolved upon giving a bond. It appears that more than four months thereafter proceedings were had in bankruptcy against the defendant and he was discharged. We there held, that this discharge in bankruptcy did not prevent the plaintiff from obtaining a judgment in the attachment suit against the defendant, with a perpetual stay of execution. The object of the judgment was to allow the plaintiff to proceed against the sureties on the bond given to dissolve the attachment. It was further held, and we here quote from the opinion: "But it is earnestly insisted there is no such practice in this State, as to warrant a special or qualified judgment, to wit, a judgment with a perpetual stay of execution and the Courts are without power to so render them. We are, however, unable to agree with this contention. A sufficient warrant, we think, can be found in sec. 14 of Article 26 of the Code of Public General Laws, 1904, wherein it is provided, the Court shall give judgment in all actions according as the very right of the cause and matter in law shall appear to them, without regarding any matters of mere form, so as sufficient matter, shall appear in the proceedings, upon which the Court shall proceed to give judgment, and it shall appear that the action has been commenced after the cause thereof did accrue. When it appears, then, a good and sufficient reason exist for a qualified judgment as in this case, such a judgment can be rendered." 2 *Evans Harris*, 345; *Peck v. Jenness*, 48 U. S. 612; *Dor v. Childress*, 88 U. S. 642; *Hill v. Harding*, 130 U. S. 702.

The ultimate inquiry then in the case at bar and wherein it differs from *Kendrick and Roberts v. Warren Bros.' Case*, *supra*, properly comes to this: Can the Courts of this State, enter a judgment, with a perpetual stay of execution, against a defendant in an attachment suit, instituted *within four months before* the defendant has filed a petition to be adjudicated a bankrupt and when he is subsequently discharged as a bankrupt, for the purpose of allowing the plaintiff to proceed against the surety on the bond given to dissolve the attachment?

The decision of this question as we have said, must depend upon the language and the effect to be given to Section 67 F of the Bankrupt Act, herein cited. The language of this section, we think, is quite clear and comprehensive, and broad enough to include within its terms, the defendant, and the surety we are here dealing with. It provides in terms that all levies, judgments, *attachments*, or other liens obtained against a person who is insolvent, at any time *within* four months prior to the filing of a petition in bankruptcy against him shall be deemed null and void in case he is adjudged a bankrupt.

In *Kendrick and Roberts v. Warren Bros.*, *supra*, we held, upon the authority of *Hill v. Harding*, 130 U. S. 702, that where the bond or recognizance was given to dissolve the attachment, issued more than four months before the commencement of the proceedings in bankruptcy, there was nothing in the provisions of the Bankrupt Act to prevent the State Court from rendering a qualified judgment, with a stay of execution. JUSTICE GRAY in delivering the opinion of the Court, in *Hill v. Harding*, *supra*, said: "Such attachments being recognized as valid by the Bankrupt Act (*Rev. Stat.*, sec. 5044), a discharge in bankruptcy does not prevent the attaching creditors from taking judgment against the debtor in such limited form as may enable them to reap the benefit of their attachment. The judgment is not against the person or property of the bankrupt, and has no other effect than to enable the plaintiff to charge the sureties, in accordance with the express terms of the contract, and with the spirit of that provision of the Bankrupt Act which declares that 'no discharge shall relieve, discharge or affect any person liable for the same debt, or with the bankrupt, either as partner, joint contractor, indorser, surety or otherwise.' If the bond was executed before the commencement of proceedings in bankruptcy, the discharge of the bankrupt protects him from liability to the obligees; so that, in an action on the bond against him and his sureties, any judgment recovered by the plaintiffs must be accompanied with a perpetual stay of exe-

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cution against him; but his discharge does not prevent that judgment from being rendered generally against them." *Wolf v. Stix*, 99 U. S. 1; *Metcalf v. Barker*, 187 U. S. 165; *Black on Bankruptcy*, 94.

But in the case now under consideration we are met with an entirely different proposition, because the Bankrupt Act (1898) declares that attachments or other liens obtained at any time *within four months* prior to the filing of a petition in bankruptcy against an insolvent person shall be deemed null and void in case he is adjudicated a bankrupt, and the property affected by the attachment or other lien shall be deemed wholly discharged and released from the same and shall pass to the trustee as a part of the estate of the bankrupt.

Now, it is quite clear, we think, if no bond had been filed, the attachment having issued within four months prior to the filing of the petition, the lien, attachment and all the proceedings would have been null and void, by the terms and operation of the Bankrupt Act.

In *Hill v. Harding*, 130 U. S. 703, it is said, the bond or recognizance takes the place of the attachment as a security for the debt of the attaching creditor, they cannot dispute the election, given to the debtor by statute of substituting the new security for the old one.

In *Conner v. Mallory*, 31 Md. 468, this Court said, the period of four months was fixed as a period within which no preference should be gained by one creditor by attachment over the claims of other creditors of the bankrupt. And the law effects no hardships in dissolving such attachments, as the creditor's claim is not impaired and he is only deprived of a lien and priority that he might otherwise obtain to the prejudice of other creditors and in violation of the policy of the law, which is to effect a fair and equal distribution of the property of the bankrupt among all his creditors.

It is also quite certain, under both the decisions and the terms of the Bankrupt Act itself, that if the property had been attached within four months prior to the filing of the

petition, and the defendant had been adjudged a bankrupt it would have been released and discharged and if this be so, there can be no reason why the bond which stands in the place of the attachment and the property should not be relieved and released. *Metchalf v. Barker*, 187 U. S. 174; *Hill v. Harding*, 130 U. S. 699; *Wolf v. Stix*, 99 U. S. 1; *Randle v. Mellen*, 67 Md. 181; *Hutchins v. Taylor*, 5 Law Rep. 289; *Swan v. Littlefield*, 4 Cush. 574; *Curtis v. Bar-num*, 25 Conn. 370.

The recent cases of *House v. Schuadig*, 235 Illinois, 304. and *A. Kilpstein & Co. v. Allen-Miles Co.*, 136 Fed. Rep. 388, are in point and are somewhat analogous cases. They present a construction of Section 67f of the Bankrupt Act of 1898, and support the conclusion we have reached in this case.

In the *Illinois Case*, *supra*, the Court said, that case was distinguishable from the *Hill v. Harding Case*, because in the *Hill Case* the attachment was sued out more than four months prior to his filing his petition in bankruptcy. The attachment became a lien in favor of the attaching creditor, upon a levy being made and this lien would not have been affected by the bankruptcy proceedings. Its release was accomplished by the recognizance given in accordance with the provisions of the statute. In the case at bar (the *Illinois Case*) the appeal bond was given on the 31st day of May, 1906, and the petition in bankruptcy was filed on the 8th of June following. If the appellants had secured a lien on property by an execution or otherwise, at the time the appeal bond was given, it would have been rendered null and void by the bankruptcy proceedings, Sec. 67f, Bankrupt Act.

The Supreme Court of Illinois, held, that the discharge in bankruptcy on the facts of that case, was a bar to the rendition of a judgment against the bankrupt, and released the surety.

In the *Klipstein Case*, the Circuit Court of Appeals, Fifth Circuit, held, that where the debt for which the plaintiff sued was provable in bankruptcy and defendant was insolvent at the time suit was brought and had since been in-

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solvent, its discharge in bankruptcy pending such suit released it from liability as provided by Bankrupt Act of 1898, and plaintiff cannot have judgment on it against the defendant.

This case was based upon a garnishment proceeding, and it was admitted as a fact, that the defendant had been discharged in bankruptcy and that within four months prior to the proceedings, garnishment was taken out, and these proceedings had been dissolved by a bond signed as surety by the Fidelity and Deposit Company of Maryland. The Court held, upon the facts of the case, that judgment could not be entered against the defendant for the purpose of taking final judgment on the bond given to dissolve the garnishment, because the discharge prevents the surety from incurring the liability. And this was so, independent of the Statute of Georgia, because the garnishment proceedings being had within four months prior to the bankruptcy proceedings, they were invalidated by the adjudication in bankruptcy. The facts of the case said the Court clearly distinguish it from the case of *Hill v. Harding, supra*, and from the other cases cited.

Our conclusion then is, that the case at bar is distinguishable from the case of *Kendrick & Roberts v. Warren Bros., supra*, and for the reasons given the defendant's demurrer to the plaintiffs' replication was properly sustained and the judgment on the demurrer in favor of the defendant will be affirmed.

This conclusion it seems to us is sanctioned by the weight of authority, as declared by the Courts and by the text-writers—*Collier on Bankruptcy*, 306; 1 *Remington on Bankruptcy*, 902; *Brandenburg on Bankruptcy*, 415; *Loveland on Bankruptcy*, 852; *In re Richards*, 3 A. B. R. 145; *First Nat. Bk. of Balto. v. Staake*, 202 U. S. 141; *Klipstein v. Allen-Miles Co.*, 201 U. S. 647.

The case of *McCombs v. Allen*, 82 N. Y., 115, cited and relied upon by the appellant in its brief, cannot be regarded as a controlling authority, if an authority at all, to sustain

the appellant's position, under the facts of this case. In that case, the Court held, that the proceedings in bankruptcy were no defense, as there was at the time no attachment lien or *attachment in force* upon which the proceeding could operate, and that neither the letter nor the policy of the Bankrupt Act, was infringed by holding the defendant liable. For the reasons given, the judgment will be affirmed.

Judgment affirmed, with costs.

THE KENT BUILDING AND LOAN COMPANY vs.
JESSE K. MIDDLETON, ET AL.

*Irregularity in Proceeding Before a Justice of the Peace—
Redemption of Mortgage by Purchaser of Equity of
Mortgagor—Tender—Exception to Mortgage Sale.*

When the defendant in a suit instituted before a Justice of the Peace has been duly summoned, the Justice acquires jurisdiction which is not affected by a subsequent irregular proceeding, the remedy for that being by appeal.

The purchaser at an execution sale of the equity of redemption of a mortgagor is entitled to redeem the mortgage, although the sheriff's deed conveying the equity to him may not have been recorded.

An offer to redeem a mortgage with a tender of the amount due, although coupled with the request that the mortgage be assigned and not released, is an absolute and not a conditional tender.

When a tender made in the form of a check on a bank is refused, not because so made but on other grounds, the creditor waives his right to have the tender made in lawful money.

When a person who has an interest in the equity of redemption, or who is a lien creditor of the mortgagor, makes an unconditional tender to the mortgagee of the amount then

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due on the mortgage and costs, with a request for an assignment of the mortgage, it is the duty of the mortgagee to accept the money without insisting on a release of the mortgage, if there is any reason why it cannot be assigned.

When a tender of the amount due on the mortgage has been made by a person authorized to redeem it, which tender is refused and the mortgage is foreclosed, such person is entitled to except to the ratification of the mortgage sale.

Decided January 11th, 1910.

Appeal from the Circuit Court for Kent County (PEARCE, C. J.).

The cause was argued before BOYD, C. J., SCHMUCKER, BURKE and THOMAS, JJ.

John D. Urie, for the appellant.

Hope H. Barroll, for the appellees, submitted the cause on his brief.

THOMAS, J., delivered the opinion of the Court.

On the 28th of February, 1903, Jesse K. Middleton, of Kent County, with his wife, Hester E. Middleton, executed and delivered to the Kent Building and Loan Company, of Chestertown, Maryland, a mortgage on his property situated in said county to secure a loan of five hundred dollars from the Company. On the 23rd of December, 1904, Charles B. Watkins recovered a judgment of a Justice of the Peace against him for \$58.26, which was recorded January 16th, 1905, and on April 17th, 1905, a judgment was obtained against him for \$155.15 by Josiah C. Armiger. Execution was issued June 22nd, 1906, on the Watkins judgment, and the property of the mortgagor covered by said mortgage was sold by Andrew Meadows, Sheriff of Kent County, subject to said mortgage for fifty dollars to Charles B. Watkins, who received from the sheriff a deed for the property, dated the

13th of November, 1907. Being anxious to retain his property, Middleton induced Watkins and Armiger, who desired to secure their claims and at the same time help him, to agree to accept two hundred dollars in payment of their judgments, and the Kent Building and Loan Company agreed to lend him the two hundred dollars with which to make the payment. Watkins and Armiger accordingly notified their counsel, Hope H. Barroll, Esq., who represented them in the matter, of their willingness to accept the two hundred dollars, and he prepared a deed of the property from Watkins and wife to Middleton, which was executed, in pursuance of an understanding with Armiger, and left with Mr. Barroll to be delivered to Middleton upon receipt of the two hundred dollars. Mr. Barroll then notified the Building and Loan Company that he had the deed and was ready to close the transaction agreed upon. The company referred the matter to its counsel, who upon examining the title found that the deed from the Sheriff to Watkins and the proceedings under the execution had not been recorded, and that the Watkins judgment had been rendered, after an *ex parte trial*, sixteen days after the return day, and concluded that the title was defective and declined to approve the loan. Mr. Barroll was notified by the company that its counsel had found the title to property defective and that it would not, therefore, make the loan, and on the same day he, representing Mr. Watkins, and by his authority, wrote Mr. Russell, Secretary of the Company, the following letter:

“CHESTERTOWN, MD., Jan. 29, 1908.

Mr. J. Waters Russell, Town.

Dear Sir:—Please give me a statement of the mortgage against Jesse K. Middleton and I will pay same off pending arrangements he is now making for same.

Yours truly,

HOPE H. BARROLL.”

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To this letter Mr. Russell replied, February 7th, 1908, sending a statement showing the amount due on the mortgage to be \$177.05. On the 8th of February, 1908, the day he received the letter of February 7th from Mr. Russell, Mr. Barro'll wrote him enclosing his check for the \$177.05, and stating: "Herewith enclosed I hand you check for \$177.05 of the mortgage of J. K. Middleton due the Kent Building and Loan Company. Please assign the mortgage to me. I pay it at the request of Mr. Durdin and Mr. Middleton. Mr. Durdin writes me today he expects to take it up. He does not want the mortgage released." Mr. Durdin was one of the directors of the company, and through whom Middleton had secured the promise of the company to lend him the two hundred dollars. On the 11th of February, 1908, Mr. Russell replied as follows: "I am authorized by our board to return you your check for \$177.05, which I herein send you, as we are unable to assign the mortgage without Mr. Jesse K. Middleton's concurrence," and says in his testimony that he saw Middleton before he returned the check, and that he stated that Mr. Barroll was not acting for him or authorized by him to take an assignment of the mortgage, and that he was not willing to have the mortgage assigned to him; that if Middleton had been willing to have the mortgage assigned the "Company would have assigned it upon the receipt of Mr. Barroll's check," and that the only reason the company did not accept the check and it was returned, was because Middleton would not give his consent to the assignment of the mortgage. On the same day that Mr. Barroll's check was returned, John D. Urie, Esq., the attorney named in the mortgage, filed his bond and instituted foreclosure proceedings. The property was sold under the mortgage, and the sale was reported on the 10th of March, 1908. On the 20th of March, 1908, Charles B. Watkins filed exceptions to the ratification of the sale, and the Circuit Court for Kent County, on the evidence in the case, which clearly establishes the facts we have stated, passed an order sustaining the exceptions, setting aside the sale and allowing Charles B. Watkins

thirty days within which to renew the tender of the amount theretofore tendered by him; and providing that upon his failure to do so, the mortgagee may sell the property under the mortgage.

In this order of the learned Court below we fully concur. The officers of the appellant knew that Middleton desired the loan of two hundred dollars for the purpose of settling the Watkins and Armiger judgments, and when Mr. Barroll notified them that he held the deed from Watkins and wife to Middleton and was ready to close the transaction, they must have understood that he did so as attorney for Watkins. Having determined not to make the loan, they accordingly notified both Mr. Middleton and Mr. Barroll, and when Mr. Barroll promptly wrote the secretary and treasurer of the company, requesting a statement of the amount due on the mortgage, and saying that he intended to pay the same, they knew he was representing Mr. Watkins, and had no reason to infer that he was acting for anyone else when they returned his check, for Mr. Middleton had told them that he had no authority to act for him. As he was authorized by Mr. Watkins to redeem the mortgage, and as his check for the amount then due on the mortgage was tendered for that purpose, the only questions presented by the record, are (1) whether Mr. Watkins had a right to redeem it; (2) whether there was a sufficient tender for that purpose; and (3) whether, upon the refusal of the company to accept the amount tendered, Mr. Watkins had a right to except to the ratification of the sale.

The short copy of the Watkins judgment offered in evidence does not show on its face that the defendant was summoned, but there is no exception to this evidence; it does not appear that the validity of the judgment was ever questioned by Mr. Middleton, who admits in his testimony that Mr. Watkins held a judgment against him, and Mr. Urie, counsel for the appellant, who examined the proceedings in the case, states in his testimony that the defect he found in the judgment was that it had been rendered sixteen days after the return day of the writ. *Insolvent Estate of Leiman*, 32 Md.

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page 244. No question as to the validity of the judgment has been suggested either in the oral argument of the learned counsel for the appellant or in his brief, and there can be no doubt that where the defendant has been summoned and the justice thereby acquires jurisdiction in the case, if he subsequently proceeds erroneously or irregularly his jurisdiction is not thereby affected, and the only remedy is by appeal. *Mottu v. Fahey*, 78 Md. 389; *Weed v. Lewis*, 80 Md. 128.

While counsel for the company, who examined the title and the proceedings under the execution, may have been justified in declining to recommend the loan until the deed from the Sheriff to Mr. Watkins had been recorded, we think the deed, the execution and delivery of which has been proved, is evidence of the sale of the property to Mr. Watkins and of his right to redeem the mortgage. *Estep v. Weems et al.*, 6 G. & J. 303; *Dorsey v. Dorsey*, 28 Md. 388.

In 2 *Story's Equity*, sec. 1023 (5th ed.), the learned author says: "It is clear, that the equity of redemption is not only a subsisting estate and interest in the land in the hands of the heirs, devisees, assignees and representatives (strictly so called) of the mortgagor; but it is also in the hands of any other persons, who have acquired any interest in the lands mortgaged by operation of law, or otherwise, in privity of title. Such persons have a clear right to disengage the property from all incumbrances, in order to make their own claims beneficial or available. Hence a tenant for life, a tenant by the curtesy, a jointress, a tenant in dower in some cases, a reversioner, a remainderman, a judgment creditor, a tenant by elegit, the lord of a manor holding by escheat, and, indeed, every other person, being an incumbrancer, or having legal or equitable title, or lien therein, may insist upon a redemption of the mortgage, in order to the due enforcement of their claims and interests respectively in the land." And in 3 *Equity Juris.*, sec. 1220 (3rd ed.), Mr. Pomeroy states that, "Any person who holds a legal estate in the mortgaged premises, or in any part thereof, derived through, under or in privity with the mortgagor, and any person holding either

a legal or equitable lien on the premises, or any part thereof, under or in privity with the mortgagor's estate, may also in like manner redeem from the prior mortgage." The same rule is recognized in 2 *Jones on Mortgages*, sections 1055-1069 (5th ed.); *McNiece v. Eliason*, 78 Md. 168; *Parsons v. Urie*, 104 Md. 238.

There can be no doubt on the authorities cited of Mr. Watkins' right to redeem the mortgage.

2. The tender made by Mr. Barroll was not made upon the condition that the company assign the mortgage to him. In his letter asking for a statement of the amount due he stated that he intended to pay it, and he accordingly sent his check for that purpose. The statement in his letter enclosing the check that Mr. Durning did not want the mortgage released, and the request that the mortgage be assigned to him, do not show a conditional tender, but an absolute tender accompanied by a request to assign the mortgage and not to release it. Nor was the tender refused because it was in the form of Mr. Barroll's check, but it was declined, as stated by the secretary and treasurer of the company, because Mr. Middleton would not consent to an assignment of the mortgage. Under such circumstances the appellant must be regarded as having waived all objection to the form of the tender. In the case of *McGrath v. Gegner*, 77 Md. 331, JUDGE ROBINSON says, "we take it to be well settled that, where a tender is made, whether it be by ordinary bank notes, or by a cheque on a bank, and the tender is refused, not because of the character or quality of the tender itself, but on other grounds, the tender thus made and refused will be considered in law a lawful tender. And for the reason, that all objection to the character of the tender will be considered as having been waived; and for the further reason, that, if objection had been made on the ground that the tender was not made in lawful money, the party would have had the opportunity of getting the money and of making a good and valid tender." See also *Hartsock v. Mort*, 76 Md. 292, and *Bonaparte v. Thayer*, 95 Md. 548.

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Where a person who has an interest in the equity of redemption, or a lien creditor of the mortgagor makes an unconditional tender to the mortgagee of the amount then due on the mortgage, and of the amount of any costs that have been properly incurred, with a request for an assignment of the mortgage, if there is any reason why the mortgage cannot be assigned, it is the duty of the mortgagee to accept the money without insisting upon a release of the mortgage. *Parsons v. Urie, supra.*

3. Section 9 of Article 66 of the Code, provides that all sales under a mortgage shall be reported to the Court, and that "the Court shall have full power to hear and determine any objections which may be filed against such sale by any person interested in the property and may confirm or set aside said sale." The appellee was interested in the property, and having tendered to the mortgagee the full amount then due on the mortgage for the purpose of redeeming it, as he had a right to do, the mortgagee had no right to institute foreclosure proceedings, which a Court of equity, upon proper application, would have enjoined. As a mortgagee has no right to make the sale after a lawful tender of the amount due, the sale, when made, may be excepted to by the party authorized to redeem the mortgage and who made the tender. *Carroll v. Kershner*, 47 Md. 262; *McNiece v. Eliason*, 78 Md., *supra*; *Aukam v. Zantzinger*, 94 Md. 421.

The Court below did not, in his view of the case deem it necessary to pass on the exceptions of the mortgagee to the evidence, and it is only necessary to say, that in so far as they relate to the evidence to which we have referred and upon which we base our conclusions, they should have been overruled.

For the reasons we have stated, the order appealed from must be affirmed.

*Order affirmed, the costs in this Court and
in the Court below to be paid by the
Kent Building and Loan Company.*

THE AMERICAN SYRUP AND PRESERVING COMPANY vs. WM. H. ROBERTS, TRADING AS THE OLD TOWN CAN COMPANY.

Evidence—Instructions to Jury—Sales—Warranty of the Soundness Relates to the Time of Delivery.

In an action to recover damages for the defective condition of tin cans bought by the plaintiff from the defendant, who was a manufacturer, a witness may be asked whether or not all of the cans manufactured by the defendant were subjected to a certain test, since there was no evidence in the case to show that those shipped to the plaintiff were not manufactured by the defendant.

A prayer instructing the jury that, "if from the evidence they find for the plaintiff they cannot speculate as to the measure of damages, and unless they find a certain and definite amount as the loss, they cannot find for the plaintiff more than nominal damages," is calculated in some instances to mislead the jury. But since in this case the jury found a verdict for the defendant, the plaintiff was not injured by the instruction.

The warranty of soundness of an article sold relates to its condition at the time of delivery or transfer of title.

A written contract provided for the sale by the defendant in Baltimore to the plaintiff in Nashville, Tenn., of a quantity of tin cans, to be shipped in April and May, f. o. b. Baltimore, sight draft against bill of lading, "usual guarantee against leaks not to exceed two to the thousand." Plaintiff alleged in this action that many of the cans so bought and paid for were leaky and worthless and brought this action to recover damages therefor. His evidence showed that the use of the cans did not begin until sixty or ninety days after their receipt. *Held*, that under the contract the place of delivery of the cans was Baltimore; that the warranty of sound-

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ness related to their condition at the place and time of delivery, and that the jury was properly instructed that the defendant was only bound to deliver the cans to the plaintiff f. o. b. cars Baltimore, free of leaks, exceeding two cans to each thousand, and unless from the evidence the jury found that the defendant did not so deliver the said cans, then the plaintiff is not entitled to recover.

Decided January 12th, 1910.

Appeal from the Court of Common Pleas of Baltimore City (DOBLER, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE and THOMAS, JJ.

Ralph Robinson, for the appellant.

William A. Wheatley, for the appellee.

BOYD, C. J., delivered the opinion of the Court.

The appellant sued the appellee to recover damages alleged to be sustained by the former by reason of the latter furnishing it a number of tin cans, many of which were leaky and entirely worthless for the purposes for which they had been ordered and purchased. The trial of the case having resulted in a verdict for the defendant, the plaintiff appealed from the judgment entered thereon.

During the course of the trial the following contract was offered in evidence:

"BALTIMORE, MD., March 23, 1904.

Sold to the American Syrup and Preserving Company, Nashville, Tenn., 100,000 No. 3 P. H. cans, full standard size, at \$18.00 per 1,000 f. o. b. Baltimore. Shipment to be made one car on or about the latter part of April, and one the last week of May. Usual guarantee against leaks, not to exceed two to the 1,000. Full complement of caps. Terms: Sight draft against B/L."

It was signed by both parties.

There are two bills of exception in the record, the one presenting the ruling of the Court on a question of evidence. and the other embracing the rulings on the prayers. The Court granted the defendant's fifth, seventh and eighth prayers, and overruled the plaintiff's special exception to the defendant's fifth prayer. We will first consider the question of evidence. William Hudgins testified that he had been engaged for fourteen years testing cans and had been testing for the defendant six years. He then described the method of making the test, and in answer to the question whether he had tested all the cans which had been shipped by the defendant, since he was in his employ, he replied that he had, but added that "in case of sickness we generally have a special gentleman to take my place in testing, of course, he is as good as I am, to do any testing." On cross-examination he was asked whether he knew any thing about this particular shipment, and replied: "I don't know nothing about that, when I test cans and they go through my hands, I don't know where they go to." He was then asked on re-examination: "State whether or not all the cans manufactured by William H. Roberts, trading as the Oldtown Can Company, since you have been in its employ, no matter to whom shipped or where going, whether or not these cans were subject to this test?" And he replied: "Yes, sir." Thereupon, the plaintiff, having previously objected to the question as irrelevant, immaterial and incompetent, moved to strike out the answer, but the Court overruled the motion, and the plaintiff excepted to its ruling.

We do not see any objection to that testimony. The plaintiff on cross-examination had attempted to cast doubt on the statement of the witness in chief, by showing that he did not know anything about the shipment of these particular cans. It is true that the question was confined to "all the cans manufactured" by the defendant, while a former question related to all "shipped," but there is nothing to show that any were shipped by the defendant which were not manu-

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factured by him. If there were any it was proper to prove that such as were manufactured were tested, and other testimony could have been offered as to those which were shipped, but not manufactured by him. There was some controversy in the testimony as to whether the cans of the defendant were marked with an O in another O—the plaintiff's witnesses claiming that they identified the cans by such mark, and the defendant's witnesses denying that the cans manufactured by him had such mark, but it was not said that he shipped any which he did not manufacture. The inference to be drawn from the testimony is that the defendant was undertaking to show that the plaintiff's witnesses were speaking of cans other than those shipped by the defendant, and it seemed to be assumed that he had manufactured all that were shipped.

We do not find any reversible error in the fifth prayer of the defendant which instructed the jury that "if from the evidence they find for the plaintiff, they cannot speculate as to the measure or amount of damage, and unless they find from the evidence a fixed certain and definite amount as the loss, if any, they cannot find for the plaintiff more than nominal damages." Such prayers are not desirable, and may in some instances mislead the jury. Of course, the jury has no right to speculate as to the amount of damage, and they ought to rely on definite evidence, but when the evidence as to damage is not contradicted, it may mislead the jury to give such instruction as this. But as the prayer permitted the jury to find at least nominal damages for the plaintiff, if they found for it at all, and as in point of fact they found for the defendant, it is manifest that the plaintiff was not prejudiced by the instruction, as the case did not turn on the amount of damages the plaintiff sustained, but whether it was entitled to recover at all, as is shown by the defendant's seventh prayer.

The latter is the one which presents the important question in the case. It is as follows: "The Court instructs the jury that by the terms of the contract sued on, the defendant

was only compelled to deliver the cans to the plaintiff f. o. b. cars at Baltimore, free of leaks exceeding two cans in each one thousand, and unless from the evidence the jury find that the defendant did not so deliver the said cans f. o. b. Baltimore, not exceeding two leaks per thousand cans, then the plaintiff is not entitled to recover in this action."

In *Lauder Co. v. Mackie Grocery Co.*, 97 Md. 1, the terms of sale of some canned tomatoes were cash, "buyer to give shipping instructions when requested by seller. To be delivered as packed during the season of 1901 f. o. b. Baltimore." In a suit by the purchaser who lived in New Orleans, against the sellers, who were canners in Baltimore, for breach of contract in not furnishing the tomatoes, we held that by the terms of the contract the payment was to be made in Baltimore upon delivery of the tomatoes on board the car and the purchaser having refused, as alleged in the plea under consideration in that case, to make such payment, it could not sustain the action. Reliance was placed on the right of the purchaser to inspect the goods before acceptance, and, conceding that right, we said: "The mere fact that the buyer has the right to inspect goods before acceptance does not necessarily mean that the inspection is to be made at the residence or place of business of the buyer. He might inspect at the seller's place of business, but if the contract provides for delivery at a particular place, he must accept or reject at that place, unless otherwise provided for in the contract. In short, a contract to deliver at one place cannot be said to mean delivery at another place, because the buyer lives there and has the right to inspect the goods." In this case the cans were sold "at \$18.00 per 1000 f. o. b. Baltimore," where the seller had his factory, and the terms were "Sight draft against B/L"—meaning bill of lading. In the case of the *Lauder Co. v. Mackie Co.*, the terms were "Cash"—we having held that the addition "less one and one-half per cent" did not prevent the sale from being treated as a cash sale. It is largely upon that difference in the terms that the

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appellant relies, although there are other important distinctions between the two cases.

If this prayer had referred to the pleadings, it would have simplified the case, for the declaration alleges that the defendant proceeded to ship the cans "which the plaintiff, relying upon said guarantee *and in compliance with the terms of sale*, paid for, immediately upon being advised of shipment, and before delivery, and consequently without any opportunity of examination." But as none of the prayers in the record refer to the pleadings, we must be governed by the evidence alone. When, however, the evidence is examined there would seem to be but little room to doubt the intention of the parties and their understanding of the contract. Mr. Rich, the secretary and treasurer of the appellant, who was the only officer of the company examined, said on cross-examination: "That it is a fact that the defendant did not deliver the cans at Nashville, Tennessee, and that it is a fact that by the terms of the contract they did not have to deliver them to the plaintiff at Nashville, Tennessee; that he guesses the defendant made delivery in Baltimore, f. o. b. Baltimore; that he judges the defendant did deliver the goods on board Baltimore, that he got them in Nashville; that he got the bill of lading with draft attached; that by the terms of the contract the plaintiff was to pay the sight draft against the bill of lading issued to the plaintiff company; that this was done." He also testified that they had no machinery for testing cans. The above testimony was admitted without objection, and therefore is to be considered, even if there is any question about its admissibility.

In *Dexter Paper Co. v. McDonald*, 103 Md. 391, this Court said: "But this is not all that appears to indicate the true construction of the contract in question. 'Every contract is * * * to be interpreted in connection with the surrounding circumstances; and the acts of the contracting parties in fulfillment of the contract may be regarded in order to see what interpretation they themselves put upon it and what conditions have been waived or performed; and the con-

struction of the instrument may thus be varied by matters *ex post facto*.' 2 *Addison on Cont.* 1193 (star paging). In this case the acts of the parties throw light upon how the contract in question was understood by them." The testimony of Mr. Rich further shows that after the cans arrived at Nashville, and they had paid the drafts, they were taken into actual possession by his company, and, although he was not very definite as to the precise time, his evidence shows that they were not commenced to be used for some time, perhaps sixty or ninety days after their receipt. The first car was shipped the latter part of April, and the second in May, and they did not begin to can the tomatoes until the latter part of July—finishing in August. It is not shown exactly when they reached Nashville, but in the absence of evidence of some unusual delay, we can assume that it did not take several months for a car to go from Baltimore to Nashville. In *P. B. & W. R. R. Co. v. Diffendal*, 109 Md. 510, it was said, the Court could in the absence of direct proof take judicial notice of the location of two such large and important cities as Baltimore and Washington, as well as the distance between them, and of the approximate length of time required to transport a carload of goods from one city to the other, and whether or not that would be applicable to the present case, the evidence of Mr. Rich is sufficient to show that the cans were received some time before his company had to use them.

It could not be contended that the appellant could delay inspection and testing until it was ready to use the cans. There is not a particle of evidence to show that the cans were in a different condition when they arrived in Nashville, from what they were when they left Baltimore, but on the contrary, the evidence of Mr. Rich, and of the appellant's only other witness, is to the effect that they were not properly soldered, and that the solder was not of a proper kind. Of course the purchaser had the right to rely on the guarantee, and that is what it apparently did. The appellant does not and could not consistently, claim that it discovered

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the defects before it put the tomatoes in the cans, for, if it did, it could not recover for the loss of such as it put in defective cans. The evidence of Mr. Rich was that about a week after the tomatoes were put in the cans, it was noticed that a good many of them were "forcing open."

The evidence of the plaintiff offered to show what it was entitled to recover consisted of slips of paper, stating the leaks at seams, ends and swells, and then two from each thousand were deducted from the whole, that being, it will be remembered, the warranty in the contract. So we have the testimony of the plaintiff's own officer that there was a delivery at Baltimore, and that the defendant did not have to deliver the cans at Nashville; and in addition to that we have the claim for recovery based on the warranty in the contract. Besides that, the plaintiff's prayer required the jury to find, amongst other things, that the bursting or leaking of the cans "was the result of their being improperly manufactured or manufactured out of improper materials." There is no question about the cans having been sold and delivered—the only question raised being as to the place of delivery, and the plaintiff's officer showed his understanding of the contract to be that the place was where the defendant claimed it to be, namely, "f. o. b. Baltimore." If there could be any doubt about that by reason of the provision "Sight draft against B/L," the warranty would seem to solve it—"Usual guarantee against leaks, not to exceed two to the 1000." While there may be a warranty of future soundness "a warranty is ordinarily confined to the state of affairs existing at the time of sale, and is to be so construed in the absence of a clear understanding to the contrary." 30 *Am. & Eng. Ency. of Law*, 134. As is said on pages 174 and 175 of that volume: "The parties may, by express agreement, fix a particular future date as the time to which the warranty shall be referred, and, in such a case, the condition of the article at the time so fixed becomes the material injury. But, in the absence of such an agreement, the warranty is always to be construed as relating to the condition of the article at the

time of the sale, that is, when the transfer of title took place and not when delivery was made. If the sale is 'f. o. b.' at the seller's place of business, he will not be liable, on his warranty, for any deterioration of quality occurring after the shipment and while the goods were in transit unless it was due to his negligence in the manner of shipment. The buyer may, however, in such a case, having had no opportunity of testing the quality of the goods at the place of shipment, introduce evidence as to their bad quality when they reached him, together with expert testimony to show the means used for their preservation, and that if good when shipped they ought to have remained so."

It would seem therefore to be clear that as these cans were sold "f. o. b. Baltimore" with the "usual guarantee against leaks, not to exceed two to the 1000," the warranty was as of that place and not as of Nashville. And as the evidence shows that the suit was based on the warranty, and there is not only no evidence of negligence of the defendant after shipment, but none of any deterioration after the cans were placed f. o. b. Baltimore, the seventh prayer of the defendant was correctly granted, as whatever effect the term "sight draft against B/L" might have in some cases, it cannot be held to be sufficient to extend the warranty, under the evidence in this case, beyond the time the cans were placed on board at Baltimore. It would be useless, therefore, to prolong this opinion by comparing further that term with the one in the case of *Lawder Company v. Mackie Company*.

We do not understand the exception to the eighth prayer to be pressed, but will add that there does not seem to be any valid objection to it. We will affirm the judgment.

Judgment affirmed, the appellant to pay the costs.

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Syllabus.

BALTIMORE PEARL HOMINY COMPANY vs. SETH
H. LINTHICUM, TRUSTEE.

Contract Sealed by One Party and Not by the Other—Subsequent Parol Agreement.

When a seal is attached to the signature of one of the parties to a written contract, but not to that of the other party, the contract as to the latter is a simple contract, while as to the former it is a contract under seal.

Consequently, in an action against the party who did not seal the contract, evidence would be admissible to show that it was changed by a subsequent parol agreement, and therefore that party has no ground for invoking the jurisdiction of a Court of equity upon the allegation that such evidence would not be admissible in an action at law.

Decided January 11th, 1910.

Appeal from the Circuit Court No. 2 of Baltimore City (SHARP, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE and THOMAS, JJ.

Frank B. Smith (with whom was *W. Irvine Cross* on the brief), for the appellant.

Albert E. Donaldson (with whom was *S. S. Field* on the brief), for the appellee.

THOMAS, J., delivered the opinion of the Court.

This appeal is from a decree of the Circuit Court No. 2 of Baltimore City sustaining a demurrer to and dismissing the bill of complaint of the Baltimore Pearl Hominy Company against Seth H. Linthicum, Trustee.

The bill states that on the 27th of October, 1905, the plaintiff and Richmond H. Ford, trading as Richmond H. Ford & Co., executed a written contract, "and specifications forming a part of same," whereby the said Richmond H. Ford & Co. "contracted and agreed to construct and build for the plaintiff" certain buildings and improvements "upon the property of the plaintiff at the southwest corner of Howard and Ostend streets in Baltimore City;" that while the agreement made it clear that Richmond H. Ford & Co. was to receive for the work set out in the specifications "the actual costs thereof and ten per cent. additional as compensation up to the sum of forty-five thousand dollars, said agreement did not make perfectly clear the further condition that said forty-five thousand dollars was the limiting price agreed upon by said parties for the cost of said work including said ten per cent. commission and that no greater amount than said forty-five thousand dollars was to be paid by the plaintiff for the cost of the work included in said specifications with said ten per cent. commission," and that "said agreement also set forth clearly that all the work done outside of said specifications was to be paid for separately at the market price for same;" that "subsequently on the 10th day of May, 1906, before the completion of said work, the said Richmond H. Ford addressed a letter to the plaintiff, signed by him as Richmond H. Ford & Co., stating his understanding of said agreement and desiring that the said provision that said sum of forty-five thousand dollars should be the limit of plaintiff's total liability for the cost of the work included in the specifications and the commission thereon should be made a distinct part of said agreement," and that the "plaintiff on May 11, 1906, by letter in reply addressed to Richmond H. Ford & Co., accepted the said proposition, and agreed that said provision should form a distinct part of said agreement;" that "the work went on under the agreement as thus completed and understood by the parties thereto and payments were made on the faith thereof to the said Richmond H. Ford & Co., and accepted by him on account of both work included

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in said specifications and work not so included;" and the plaintiff in fulfillment of the agreement paid to Richmond H. Ford & Co., "for and on account of the cost of the work included in said specifications and commission thereon, the whole of said sum of forty-five thousand dollars as set forth in said contract and in addition thereto paid in full, in accordance with the terms of said contract and specification, the cost of all work which, under said contract, was not to be covered by said forty-five thousand dollars, so that said Richmond H. Ford has been paid in full for the work done under said contract as made between him and the plaintiff and has no just and equitable claim for any further payment."

It further charges that on the 15th of September, 1906, "Richmond H. Ford, trading as Richmond H. Ford & Co., had filed against him a petition in bankruptcy and was adjudged a bankrupt in the United States District Court for the District of Maryland" and Seth H. Linthicum, the defendant, was elected trustee of the estate of said bankrupt, and that he duly qualified and assumed his duties as such trustee; that the agreement "as first executed on the 27th of October, 1905, had affixed under the signature of the said Richmond H. Ford & Co. a seal, though no seal was attached to the signature of the plaintiff, so that the said paper, as the plaintiff is informed, could not, at law, as an agreement be modified or completed by any agreement not under seal;" that the said Seth H. Linthicum, Trustee, "on the 30th of October, 1907, filed in the Court of Common Pleas of Baltimore City an attachment against the plaintiff as a non-resident claiming the sum of \$14,510.49 as being still due and unpaid by the plaintiff on account of said contract, which said attachment has been removed to the Superior Court of Baltimore City, where the said case is now pending and is about to be tried;" that "the claim upon which said attachment is brought—is a wholly fictitious and fraudulent claim, being based in a great part upon an alleged cost of the work included in said specifications beyond the said sum of forty-five thousand dollars; and it is the intention of the said Seth

H. Linthicum, Trustee, by said attachment proceedings to avoid the effect of said letters which completed the agreement between the said parties and formed a necessary part thereof and to make the plaintiff liable upon an interpretation of a mutilated and imperfect agreement that did not express the real and final agreement of the parties and did not constitute the agreement under which the parties acted and on the faith of which the plaintiff made his payments to said Richmond H. Ford & Co. All of which proceedings constitute a great hardship and a fraud upon this plaintiff, who has, as is well known to the said trustee, made full payment to the said Richmond H. Ford & Co. of all that in equity and good conscience the said Richmond H. Ford & Co. or said trustee have ever been entitled to demand on account of said contract," and that the plaintiff is without remedy in the matter "unless relieved by the action of a Court of equity, because the said original paper being a sealed instrument cannot be modified or added to by any subsequent agreement of the parties not under seal." The prayer of the bill is for an injunction restraining the trustee from further proceedings at law against the plaintiff to collect said claim, and "especially from proceeding further with the said attachment proceeding in the Superior Court of Baltimore City."

The letters referred to in the bill are as follows:

"BALTIMORE, MD., May 10th, 1906.

Harry B. Smith, President,
Baltimore Pearl Hominy Co.,
Baltimore, Md.

Subject:—Contract Richmond H. Ford & Co., Contractor, and Baltimore Pearl Hominy Co., Contractee, with reference to certain ambiguity.

Dear Sir:—With reference to the above subject-matter and to avoid any misunderstanding in certain terms thereof, we wish to express our views and to have this matter made a part of the same, viz:—In the said agreement executed in duplicate and dated October 27th, 1905, paragraphs Nos. 1, 4 and 9,

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where it refers to the cost of the erection of the buildings and the remuneration therefrom of ten (10) per centum we understand that the entire cost (to include said remuneration or commission) shall not exceed forty-five thousand (\$45,000) dollars.

Please acknowledge the receipt of this letter, and thus conclude in the minds of the parties thereto might be regarded as an ambiguity.

Yours truly,

RICHMOND H. FORD."

"BALTIMORE, MD., May 11th, 1906.

Richmond H. Ford & Co.,

Equitable Bldg., City.

Subject:—Contract Richmond H. Ford & Co., Contractor, and Baltimore Pearl Hominy Co., Contractee, with reference to certain ambiguity,

Gentlemen:—I beg leave to acknowledge the receipt of your letter of the 10th day of May, 1906, concerning a certain ambiguity, or what might have been regarded as such, in the above subject-matter. Your statement conforms to my views, and I wish to accept the same from henceforth, as suggested by your letter, a part of our contract.

Yours very truly,

H. B. SMITH, President,

Baltimore Pearl Hominy Co."

It is apparent from the above recital of the allegations of the bill, that the only ground on which the plaintiff claims the right to invoke the jurisdiction of a Court of equity is that the agreement of the parties as evidenced by these letters is not available as a defense in a Court of law in a suit by the defendant against it to recover an amount claimed to be due and payable under the terms of the original contract. The plaintiff contends that an obligation under seal cannot be altered except by an instrument executed with the same solemnity, and that in an action at law on a contract under seal, a subsequent agreement not under seal, by which the terms of the original contract are modified, cannot be plead-

ed as a defense, and relies upon the cases of *Zihlman v. Cumberland Glass Co.*, 74 Md. 303, and *Conner v. Groh, Doub & Co.*, 90 Md. 674.

In the former case the suit was for a breach of a contract under seal, by which the defendant corporation agreed to pay plaintiff a certain royalty for the use of a patent which had been granted to him. The defendant averred in its second plea that the patent belonged to the plaintiff and his brother, and that in accordance with a *prior verbal agreement*, the defendant, with the approval of the plaintiff, paid one-half of the royalty earned by the patent to the plaintiff and the other half to his brother. The Court, in affirming the ruling of the Court below sustaining a demurrer to the plea, said: "This plea is pleaded as a common law defense to an action on a contract under seal. It seeks to vary and contradict not only the express terms of the patent, but those of the sealed contract itself, by verbal proof, and by a *verbal agreement* made *before* the contract sued on was executed, and by a verbal agreement or *understanding* made subsequently thereto. That this is no legal defense to the action seem to us too clear for argument." In *Conner's Case* the bill was filed for the cancellation and reformation of the contract under seal alleged to have been procured by fraud and misrepresentations, and for an injunction restraining the prosecution of a suit at law on said contract. The defendant contended that the plaintiff "had a full, complete and adequate remedy at law by a plea 'for defense upon equitable grounds' under sec. 83 of Article 75 of the Code," but this Court, speaking through JUDGE PEARCE, said: "If we should now hold that this statute has so enlarged the jurisdiction of Courts of law as to confer upon them the power of cancelling and reforming contracts, we should destroy, by construction, one of the fundamental distinctions between the jurisdiction of law and equity, and this we are not prepared to do."

Even if we were to admit that these cases go to the extent of holding that in a suit on a contract under seal the defendant cannot rely, in a Court of law, upon a subsequent agree-

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ment not under seal, made before breach and acted on by the parties, they have no application to the facts in this case.

The bill states that the contract of the 27th of October, 1905, was signed and sealed by Richmond H. Ford & Co., but was not sealed by the plaintiff, and the copy of the contract filed with the bill and included in the record, shows that there is but one seal to the contract, and that is opposite the name of Richmond H. Ford. The contract is not, therefore, the deed or *contract under seal* of the plaintiff, and any action in a Court of law against the plaintiff, to recover on this contract, must be based on a simple contract and not on a specialty.

In *Stabler v. Cowman*, 7 G. & J. 287, BUCHANAN, C. J., states the case as follows: "This is an action on the case, upon a contract in writing, between the plaintiff and defendant, concluding with these words, 'in witness of which, we have hereunto set our hands and seals,' with the word *testc* prefixed to the name of the subscribing witness, whose handwriting, he being dead, was proved at the trial.

"It was signed and sealed by the plaintiff, and signed by the defendant, but with no appearance of a seal, or of there ever having been one, opposite to, or in any manner connected with his signature. The only seal, or appearance of one upon the instrument, being that of the plaintiff.

"Issue was taken on the plea of *non assumpsit*, and to support the issue on his part, the plaintiff offered to read this paper in evidence, which being objected to, it was rejected by the Court on the ground that, although having but one seal, it must be taken as sealed by both parties, and therefore, could not be admitted in evidence in this form of action, to prove the contract stated in the declaration.

"It could only have been on the ground, that it was the deed of the defendant, and covenant therefore, the proper action, that it was rejected, otherwise it must have been admitted, as in the case of any other contract not under seal which furnishes the subject of an action on the case." The Court, after holding that the contract was not the deed of the de-

fendant, reversed the judgment of the Court below and remanded the case for a new trial.

Stabler's Case was cited and relied on in *Western Md. R. R. Co. v. Orendorff*, 37 Md. 328, where the Court said: "In *Stabler v. Cowman*, 7 G. & J. 284, where a contract in writing was entered into between two parties intended to be signed and sealed by both, but which was signed and sealed by one only, and signed by the other but not sealed, it was held that both were bound, but in different forms; that while it was the covenant of the former, it was merely the parol contract of the latter, and an action of *assumpsit* against him was sustained."

The contract in this case being the *simple contract* and not the deed of the plaintiff, in an action at law on the contract against the plaintiff, any subsequent agreement of the parties affecting the liability of the plaintiff would be available as a defense and admissible in evidence. *Coates v. Sangston*, 5 Md. 121; *Atwell v. Miller*, 11 Md. 348.

In *Allen v. Sowerby*, 37 Md. 410, JUDGE STEWART, after stating the rule that "parol contemporaneous testimony is inadmissible to contradict or vary the terms of a valid written instrument," says "without doing violence to this long established and useful rule of evidence, it has been held competent to prove by parol a distinct subsequent agreement, waiving, abandoning or modifying the terms of the writing, or to prove an *additional supplementary agreement*, by parol, by which *something* is *supplied*, that is not in the written contract."

As full force and effect can be given to the agreement evidenced by the letters referred to in any action at law against the plaintiff on the original contract, and as no other ground is presented by the bill for the intervention of a Court of equity, we must affirm the decree of the Court below.

Decree affirmed with costs.

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Syllabus.

SAMUEL H. WOODLAND, ADMINISTRATOR, ET AL.
vs. EDWARD H. WISE.

*Landlord's Claim as General Creditor in Distribution of Assets
of Insolvent Corporation.*

When a corporation which, as lessee of property, had agreed to pay a certain rent for a short term of years, becomes insolvent and is placed in the hands of receivers, but not dissolved, the lessor is entitled to claim as a general creditor in the distribution of the assets of the corporation for the full amount of the rent accruing after the receivership and before distribution, when he has been unable to rent the premises during that time to other parties.

Decided January 14th, 1910.

Appeal from Circuit Court No. 2 of Baltimore City
(GORTER, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

John J. Hurst (with whom was *George T. Mister* on the brief). for the appellant.

John Hinkley and *Frederick J. Singley*, for the appellee.

URNER, J., delivered the opinion of the Court.

The appellee in this case leased a banking room to the Farmers' Trust, Banking and Deposit Company of Baltimore City for a term of two years ending April 30th, 1908, at the annual rental of twenty-five hundred dollars payable in equal monthly instalments in advance. On October 9th, 1907, the Court below, at the suit of a creditor appointed

receivers for the company on the ground of its alleged and admitted insolvency. No provision was made in the order, and no action has since been taken, for the formal dissolution of the company.

At the time of the appointment of the receivers there was due and unpaid one monthly installment of rent which had become payable on October 1st, 1907, in advance under the terms of the lease. Application was promptly made by the appellee for permission to distrain for this installment, but pending an order *nisi* for that purpose it was paid by the receivers under leave of the Court. Simultaneously the receivers and the appellee entered into an agreement in writing which provided that the leased premises be surrendered by the former to the latter on or before October 31st, 1907; that certain effects of the company, which it was not then expedient to remove, should be left on the premises, subject to removal on ten days' notice with the understanding that the receivers, as such, should not be liable for any rent accruing after October 31st, and that the appellee's lien on the property not removed should be released; that neither the acceptance of the October rent from the receivers, nor the possession of the premises by the appellee should waive such claim as he might have against the estate of the lessee company for the loss in rent or otherwise, under the lease, from November 1st, 1907, to the date of the re-rental of the premises at the same rent, or the date of the expiration of the term; and that the appellee might immediately advertise the property for rent, but his efforts to that end should not be construed as a waiver of his rights against the estate under the lease.

In February, 1908, the appellee, having failed to secure a new tenant, filed his claim as a general creditor of the estate for six months' rent, amounting to twelve hundred and fifty dollars, accruing from November 1st, 1907, to April 30th, 1908. None of the assets had then been distributed. The first auditor's account was filed on June 2nd, 1908, about a month after the term created by the lease had expired. This account disallowed the appellee's claim, and he filed

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exceptions to its ratification on that ground. As only a partial distribution was involved in the account it was ratified without prejudice to the appellee's right to have his exceptions heard and the proper relief granted in connection with future distributions. A second auditor's account was filed in February, 1909. It also disallowed the appellee's claim, and his exceptions were renewed. Subsequently the Court below passed an order sustaining the exceptions and directing the allowance of dividends to the appellee as a general creditor to equalize him with other claims of that class. The present appeal is from that order, and it is taken by other creditors whose dividends will be affected by the admission of the appellee's claim.

It appears from an agreed statement in the record that the receivers vacated the leased premises before October 31st, 1907, and that the appellee made all possible efforts, but without success, to re-rent the property prior to the expiration of the term.

The sole question to be considered is whether the appellee's claim as a general creditor was properly allowed.

The appointment of receivers for an insolvent corporation does not work its dissolution, in the absence of a judicial declaration to that effect; *Ordway v. Central National Bank*, 47 Md. 239; *Chemical Bank v. Deposit Co.*, 156 Ill. 528; nor does it determine the rights of any of the parties concerned. *Gaither v. Stockbridge*, 67 Md. 224; 23 *Amer. & Eng. Encyc. Law*, 1041.

In the present instance, therefore, the liabilities of the insolvent but undissolved corporation were not affected by the receivership, and its assets were thereby merely impressed with a trust for its creditors.

The claim here in dispute is based upon the stipulations of a lease which was in full force and effect at the inception of the receivership. The abandonment of the demised premises by the tenant and the entry and re-letting by the landlord did not relieve the former from liability for the rent under

the terms of the lease. *Oldewurtel v. Wisenfeld*, 97 Md. 176. Every installment of rent agreed to be paid was fully matured and the amount of the claim definitely ascertained at the time of the filing of the audits making distribution of the estate. To the allowance of such a claim under the circumstances of this case, we can see no valid objection.

The right of a lessor of an insolvent corporation to claim as a general creditor against its assets in the hands of its receivers for rent maturing after the creation of the receivership was recognized in *Gailher v. Stockbridge*, *supra*. In that case the lessor insisted upon priority for his claim, but after holding that the receiver was not chargeable as an assignee of the term, the Court, through CHIEF JUDGE ALVEY, proceeded to say: "It follows that the appellant (lessor) has no such claim against the proceeds of sale of the goods and chattels sold by the receivers as entitles him to a preference over other creditors of the tenant, and that he can only occupy the position of general creditor; or he may pursue his remedy on the covenant in the lease against the lessee."

It was held in *People v. St. Nicholas Bank*, 151 N. Y. 592, that a landlord of an insolvent corporation was entitled to claim as a general creditor against its assets in the hands of receivers for the difference between the rent to accrue under the abandoned lease and the amount for which the property was redemised. In that case the original lease was for a term of five years at a rental of twelve thousand dollars a year. The insolvency of the lessee occurred, and receivers for it were appointed, three years before the expiration of the term. The lessor was entitled in this emergency, under the terms of the lease, to re-enter the property. This he proceeded to do and succeeded in procuring a new tenant at a rental of nine thousand dollars a year. A loss of three thousand dollars a year for the three remaining years of the original term, or a total loss of nine thousand dollars, was thus ascertained, and for this amount the lessor's claim as a general creditor was filed and allowed.

Md.]

Opinion of the Court.

The same rule was applied in *Chicago Fire Place Co. v. Tait*, 58 Ill. App. 293, where the receiver of an insolvent corporation refused to pay rent after his occupancy ended, and the landlord, who was unable to obtain a new tenant for part of the unexpired term, was held entitled to file a general claim against the assets for the amount of rent which at the time of the allowance would be due from the insolvent lessee under the terms of the lease.

In *Smith v. Goodman*, 149 Ill. 75, it was held that where a lessee makes a general assignment for the benefit of creditors, any damages resulting to the lessor from a breach of the covenants of the lease may be proved as a general claim against the estate in the hands of the assignee. There also a new tenant was secured before the expiration of the term and the claim was for the difference between the rentals to accrue under the first and second leases.

The cases cited by the appellants in support of their opposition to the appellee's claim appear to have been controlled by statutory provisions peculiar to the respective jurisdictions in which they were decided, and hence they do not aid us in applying to this claim the "principles of equity" to the benefit of which it is entitled under our law. *Clark v. Cotton*, 91 Md. 217.

It was suggested by counsel for the appellants that if the present claim is allowable, the same rule would be applicable to outstanding contracts of employment, and that the administration of the estates of insolvent corporations would thus be seriously complicated. We see no occasion to anticipate any difficulty on that account. There is a radical difference between a demise of a leasehold estate in realty and a contract for personal service. The rent reserved under a lease is an incident of the estate and is not apportionable; *Martin v. Martin*, 7 Md. 368; while the compensation of an employe for a stated term is earned from day to day and is adjustable and provable to the time when the insolvency of the employer renders a continuance of the service impossible. *Miller v. Cosmic Cement Co.*, 109 Md. 18.

The action of the Court below in allowing the appellee's claim ratably with those of the other general creditors was proper, in our opinion, under the facts of this case, and the order to that effect will be affirmed.

Order affirmed with costs.

WILLIAM J. McCARTY ET AL. vs. HENRIETTA
HAMBURGER, EXECUTRIX, ET AL.

Exceptions to Ratification of Mortgage Sale.

One of the exceptions filed to the ratification of a mortgage sale alleged that a certain person had circulated false reports in the neighborhood to the effect that the title to the property was defective, in consequence of which intending purchasers were prevented from making bids at the sale. *Held*, that since there is no evidence that the title was in fact defective, or that any person was restrained from purchasing or bidding on the property on account of the alleged rumor, this exception affords no ground for vacating the sale.

Another exception alleged that the sale was not fairly conducted and that the property was sold for an inadequate price. Upon an examination of the evidence, *held*, that the trustee making the sale acted throughout in good faith and fairly, with due regard to the interests of the mortgagor, and that the price for which the property was sold was not grossly inadequate.

Decided January, 11th, 1910.

Appeal from the Circuit Court for Allegany County
(KEEDY, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE and THOMAS, JJ.

Md.]

Opinion of the Court.

R. W. McMichael (with whom was *D. J. Blackiston* on the brief), for the appellants.

Ferdinand Williams (with whom were *David A. Robb* and *James A. McHenry* on the brief), for the appellees.

BRISCOE, J., delivered the opinion of the Court.

The mortgage sale in this case was reported on February 3rd, 1909, in the Circuit Court for Allegany County, by Mr. Robert H. Gordon, the attorney named in a mortgage from Margaretta McCarty to Mary E. Gordon, Robert H. Gordon and Seligman Hamburger, all of Allegany County, Maryland, and the report states that the sale was made after default, at public auction, to George H. Longerbeam of the City of Cumberland for the sum of ten thousand dollars.

The mortgage was executed on the 10th day of June, 1903, to secure the payment of an indebtedness of nineteen hundred dollars to Mary E. Gordon, the sum of four hundred dollars to Robert H. Gordon, and the sum of fifteen hundred dollars to Seligman Hamburger, and at the date of the sale repeated defaults had been made in the payment of the interest.

The property conveyed by the mortgage is stated to contain about eleven hundred acres, situate, lying and being on the North Branch of the Potomac river above the City of Cumberland, in Allegany County, and known as "The Black Oak Bottom Farm." The property was at the request of the mortgagees duly advertised by the attorney, in the Cumberland "Daily Times," a newspaper published in the City of Cumberland, and by hand bills distributed by the attorney, as a mortgagee's sale of one of the most valuable farms in Allegany County. The advertisement contained a further description, to wit: "This farm consists of about three hundred acres of Potomac river bottom land, with a lime stone base and about six hundred acres of limestone mountain woodland much of it admirably adapted to fruit trees and orchards. The land produces blue grass naturally and the bot-

tom has long been known as the best corn-producing land in Western Maryland. The Baltimore and Ohio and the Western Maryland railroads both have a station immediately adjoining this farm. There are two houses, the old homestead and a tenant house. There are stables and other buildings and each field is well watered, the Potomac river skirting one side of the farm. It is about six miles from Keyser and fifteen miles from Cumberland. There are massive beds of lime stone on the property convenient to the Baltimore and Ohio Railroad."

This property and improvements were sold by the attorney in its entirety at public sale, in front of the Third National Bank in the City of Cumberland, on the 30th day of January, 1909, after the property had been exposed for sale for the period of one hour and ten minutes.

Subsequently, on the 6th of March, 1909, certain objections were filed to the ratification of the sale by the appellants, Wm. J. McCarty and Mary S. McCarty, assignees of Margaretta McCarty, mortgagor.

They are substantially as follows:

First. That the price at which the property was sold, was a totally inadequate one and greatly less than the value of the same and far less than the property would have brought had the sale been properly and fairly made.

Second. That at and before the time at which the sale took place, a certain person, to these exceptants well known, falsely and maliciously and for the purpose of preventing persons desiring and intending to bid for the property at the sale circulated a report throughout the neighborhood where the intending bidders resided that the title to the property was defective and that the Court or the mortgagees could not give a good title to the purchaser of the property, thus preventing the intending bidders from attending the sale and bidding on the property; and

Third. And for other good and sufficient reasons to be adduced, at the hearing of these exceptions.

Md.]

Opinion of the Court.

These exceptions were overruled on hearing by the Circuit Court of Allegany County on the 25th day of March, 1909, and the sale finally ratified and confirmed. And from this order, an appeal has been taken.

We do not regard either one of the objections urged against the ratification of the sale as sound or supported by the evidence set out in the record.

There was no evidence to sustain the third objection and it is sufficient to say, it will not be considered.

The second objection, is also without merit and untenable. It is based, upon a statement that a certain person falsely and maliciously circulated a report in the neighborhood that the title to the property was defective and a good title could not be given the purchaser, whereby intending bidders were prevented from attending the sale and bidding.

It does not appear from the evidence that any *bona fide* purchaser or any person with means was prevented from purchasing the property by reason of the alleged rumor. It is not asserted in what respect the title was defective, except a bare statement made after the sale to the effect that the purchaser could not get the farm, "because it was willed to the children." There is nothing in the record to show that the title is defective or that any person with any serious intentions of purchasing the property was either prevented from attending the sale or bidding thereon in consequence of the alleged report that the title was defective. On the contrary, the witnesses Brady and Seymour who testify as to this rumor were not influenced or affected by it. They both state they heard the rumor before the sale. The former advised several persons to purchase the farm and the latter claims he is willing, since the sale, to give more than ten thousand dollars for the farm. The witness Llewellyn who, it is alleged, was prevented from buying the farm because the title was "bad," stated that he was not able to purchase it. He testified, "if I had the money I would give \$15,000 for it myself;" and Mr. Seymour was the only man so far as he knew, who was willing to give that sum for it. Such testimony is

entirely too vague, indefinite and inconclusive, in the absence of proof indicating fraud or collusion on the part of either the attorney or the purchaser, to *disturb* or vacate a sale fairly made. The purchaser alone would be injured by a defect of title if any, and in this case there is no complaint whatever from him.

The remaining questions arise upon the first exception, and they are practically: was the sale fairly made and for a price that ought to be approved by the Court?

Upon a careful review of the whole case, we are all of the opinion there is nothing in the record to show a doubt or cast suspicion upon the fairness of the sale, or to reflect upon the conduct of the attorney who made the sale or the purchaser of the property. In no view of the evidence can we perceive such inadequacy of price as would justify the rejection of the sale.

There is some conflict in the testimony and difference of opinion among the witnesses as to the value of the farm, but the highest offer on the day of sale, was ten thousand dollars. Some of the witnesses place the value of the property at \$10,000, others at \$15,000, and the owner, was willing to accept \$13,000. The property had been divided into lots, and offered at private sale, and a bid of \$13,000 therefor had been declined, at the request of the owner. Subsequently, it was advertised at public sale under the mortgage under the conditions and with the result herein stated.

The settled principle upon which Courts act in dealing with sales like the present one is too well recognized to admit of discussion. In *Carroll v. Hutton*, 91 Md. 380, it was said, a judicial sale, *bona fide* made, will not be set aside because of difference of opinion, among witnesses as to the value of the property unless the price reported is so grossly inadequate as to indicate misconduct on the part of the mortgagee or purchaser.

This subject is fully discussed and the rule applied by the Court in a number of cases: *Cohen v. Wagner*, 6 Gill, 236; *Johnson v. Dorsey*, 7 Gill, 269; *Warfield v. Ross*, 38 Md.

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Opinion of the Court.

85; *Garritee v. Popplein*, 73 Md. 322; *Banks v. Lanahan*, 45 Md. 396; *Chilton v. Brooks* 69 Md. 584; *Thomas v. Fewster*, 95 Md. 448.

Applying these well established rules, to the case at bar, we think it is clear upon the proof that the alleged inadequacy of price is not of a character to authorize the vacation of this sale.

Mr. Gordon, the attorney named in the mortgage, appears to have acted in entire good faith and to have fully discharged his duties under the terms of the power of the mortgage.

In the case of *Learned v. Geer*, 139 Mass. 32, it was held, that if a mortgagee acts in good faith and fully conforms to the terms of his power a Court will not set aside a sale because it is a hardship upon the mortgagor. The hardship, if any, results from the contract of the mortgagor and a Court cannot relieve him from it without violating the rights of the mortgagee.

There is no force in the contention that Mr. Seymour, an alleged *bona fide* intending purchaser was kept from the sale by false reports and representations of the mortgagee's attorney, that he desired the property to sell for \$15,000. While it is true, the attorney stated, he desired the property to sell for \$15,000, yet the witness was not willing to say the impression made upon him was that it would not be sold for a less sum if this amount could not be procured. The fullest opportunity was offered him to attend the sale and to bid for the property if he so desired. He will not be heard or permitted, at this late date to allege his own neglect or inattention, as the cause of his mistake, or his having been misled, if misled at all, by so slight a circumstance.

A sale of this character when fairly and regularly made will not be disturbed upon such narrow or technical grounds.

The conduct of Mr. Gordon, in the whole transaction, appears to be entirely free from any charge of bad faith, and there is no evidence whatever that can by any reasonable hypothesis be construed into an imputation of fraud, miscon-

duct, unfairness or mistake, in the sale, on the part of either the attorney who made the sale or the purchaser.

Inadequacy of price, standing by itself is not sufficient to vacate a sale, unless it be so gross and inordinate as to indicate mistake or unfairness for which the purchaser is responsible or some misconduct or fraud by the attorney who makes the sale. The testimony of Mr. Gordon is very clear and conclusive, as to his efforts to procure bidders, and his good faith, in making the sale. It is as follows: "The interest on the mortgage in which I had been named as attorney had been overdue for a considerable time, and one of the mortgagees named in the mortgage was constantly after me to either collect the interest or sell the property as attorney. That was all during the spring and summer of 1908. I tried to postpone it as long as I could, and I told Mr. McCarty that something would have to be done, that the parties were insisting on the payment of the interest and finally he consented to have me advertise the property as attorney for Mr. McCarty and his wife as the owner. We thought we could probably sell to better advantage by dividing it into two parts. I went up on the property with Mr. McCarty and formulated a description for a division of the property and then advertised the property for sale as an entirety and in two parts as will be shown by a copy of the advertisement which I will file. I had a number of bills struck off and sent bills to Garrett County to friends of mine, up to Moorefield, to be placed in Somerset County in Pennsylvania and tried to locate people that were likely to buy farms. Mr. McCarty and I worked together in connection with this matter. We offered the property for sale and on the day of the sale we had a bid of \$13,000 for the property as an entirety and something less I think than \$11,000 for the two parts. I am not positive about the figures. After having it cried for a long time, Mr. McCarty talked to some of his friends about the bid of \$13,000 and they did not seem to think it enough. I hoped to get more than that for Mr. McCarty and he thought if we withdrew it we could get more at private sale.

Md.]

Opinion of the Court.

I concurred in this and was under the impression that we might be able to do better. The sale was then withdrawn and from that time on for the next three months or more we tried to find purchasers at private sale. I had the matter up with a number of people. I went to see Mr. Reynolds who had made the bid of \$13,000 on the day of the sale to try and see if his party wouldn't increase the price. I also saw Mr. Seaver and he thought he had a party. He afterwards advised me that he could not do anything with it. I subsequently found or least so understood that the party who had bid \$13,000 through Mr. Reynolds was the party Mr. Seaver had in mind, Mr. Fesenmicer, and that he had gotten out of the notion of buying the property. I then found that there was practically no chance of selling at private sale, and I told Mr. McCarty that the only thing I thought to be done was to put it up under the mortgage and sell it. The property was then advertised, the bills were struck off, I talked to everybody I saw about it that I thought would be interested. Saw Mr. Charlie Seymour on the road to Keyser on the train, talked to him about it and told him that I thought it was a valuable property and I saw his brother up there that day, Mr. Aaron Seymour that day. Mr. Aaron Seymour came down to my office that same afternoon or the next day—I understood he was looking for a farm—and I talked to him a good while about it and told him I thought the farm ought to be worth about \$15,000. I did not tell him that I would not sell it for less than \$15,000, because I had no power to fix the price, and in addition to that Mr. McCarty told me he was willing to sell it at \$13,000 whenever he could get it in order to have the matter closed up. The interest was accumulating and he was anxious to have the matter settled. Mr. Seymour got a couple of the sale bills from me and promised me he would be over on the day of the sale. That was the last I heard of him. I carried a bunch of the small bills in my pocket for some little time before the day of the sale and handed them out personally to people I saw and thought would be probably interested. On the day of the

sale the weather was inclement. The wind was blowing and I think there was some little snow flying, very much such a day as today, probably a little colder. It was a blustery raw day. I know I had not been well and I alternated between the outside and the bank room myself. Mr. McCarty was there when the sale first started and I did not see him afterwards. The sale was continued for over an hour. It was knocked down to Mr. Longerbeam. That afternoon Mr. Longerbeam came to me and said he didn't want to take this property. He said he wouldn't pay the money. I then did not know what to do. I went to see Mr. McHenry who represented the German Savings Bank and see whether they would take the property off of Mr. Longerbeam's hands for \$10,000 and was making some arrangements looking towards that end, but before I was notified in regard to that, I saw Mr. Robert Shriver of the First National Bank and tried to get to see if they wouldn't take it in Mr. Longerbeam's place. I went to see Mr. Shriver because his bank was the holder of some unsecured paper of Mr. McCarty's and I thought I would get them interested in it for that reason. He waited until he saw one of the directors and then advised me that they would not touch it. I think it was on the Tuesday following Tuesday that Mr. Longerbeam came in and paid the \$1,000 and then I reported the sale. When Mr. Longerbeam advised me afterwards we had some conversation over the phone and I told Mr. Longerbeam that if he did not come up and comply with the terms of the sale, that I would immediately get an order of the Court authorizing a resale of the property at his risk, and subsequent to that conversation he came over and complied with the terms of sale by paying \$1,000, the balance to be on day of ratification. I was compelled to do this because I thought I had exhausted the power contained in the mortgage and might make myself responsible if I failed to get the sanction of the Court.

Q. Can you state how far the proceeds of sale will go toward satisfying the liens against this property?

Md.]

Opinion of the Court.

A. I could not exactly. It would take all I think to satisfy the liens at the present time I think. I worked harder at that sale than any other sale before in my life, and this I did on account of my personal friendship towards Mr. McCarty and his wife.

Q. I suppose in your twenty years' practising at the bar you have had plenty of experience in regard to judicial sales?

A. I have been at the bar over 35 years and have had some experience with sales."

We are convinced upon a careful examination of the whole case that Mr. Gordon acted in the utmost good faith in making this sale, and there being no just ground to doubt the propriety of the sale and there being no valid objections against it, the decree of the Court below, overruling the exceptions, and ratifying and confirming the sale, will be affirmed. The costs in the Court below to be paid as directed by the decree, the costs in this Court to be paid by the appellants.

Decree affirmed, costs in the Court below to be paid out of the fund in the hands of the attorney, the costs in this Court to be paid by the appellants.

ALBERT DIGGS vs. THE FIDELITY AND DEPOSIT
COMPANY, TRUSTEE, AND THE CONSOL-
IDATED GAS ELECTRIC LIGHT
AND POWER COMPANY.

*Consolidation of Corporations—Extinguishment of Constituent
Companies—Mortgage Securing Bonds to Be Issued for
Property Afterwards Acquired by Corporation—Ef-
fect of Consolidation on Right to Issue Bonds—
Rights of Bondholders Under Mortgage—
Liability of Trustee Under Mortgage
to Secure Bonds.*

When a trustee applies to a Court of Equity to construe the instrument creating the trust and to give directions as to its execution, persons *in esse* whose rights may be affected by the Court's action, must be made parties to the suit in person or by representation in order to bind them by the decree made therein.

The owner of property may by a deed of trust in the nature of a mortgage subject it to a lien for the payment of future debts.

Corporations have the power to mortgage property to be acquired in the future, and in such case, as soon as the property is acquired by the mortgagor, the lien of the mortgage will be regarded in equity as fastening upon it.

Code, Art. 23, sec. 46, which provides a mode by which two or more corporations may be consolidated, directs that the property, rights and liabilities of the former separate corporations shall devolve upon the new consolidated corporation, which shall be regarded as substituted in the room and stead of the former separate corporations. *Held*, that when two corporations are consolidated, their distinct corporate existence and powers perish in the process of consolidation, and that the resultant consolidated company is a new and separate

Md.]

Syllabus.

corporation, whose rights are acquired by special grant from the State, and not by way of transfer from the constituent corporations. The consolidated company is not a mere association of co-existing corporations.

If a mortgage executed by a corporation to a trustee provides for the issue of bonds to be secured by the mortgage for the purchase of property thereafter by the corporation, then if that corporation be consolidated with another by which a new corporation is created, and the former one ceases to exist, there is no power in the consolidated company to issue bonds for the property acquired by it which shall be entitled to the lien of that mortgage.

In 1904, a gas company executed a mortgage to a trustee by which it conveyed all the property it then owned and all that it might thereafter acquire to secure the payment of 15,000 bonds of \$1,000 each. Of these, 1,015 were to be forthwith certified by the trustee and delivered to the gas company—a certain number were to be used to take up underlying mortgages on the property, and 5,500 bonds were to be issued from time to time to pay a part of the cost of the property to be thereafter acquired by the company. The mortgage provided that these last-mentioned bonds could only be issued and certified by the trustee upon the certificate of an engineer as to the cost and value of the property bought, and a resolution of the directors of the company requesting the trustee to deliver the bonds. In 1906, the gas company was consolidated with an electric light and power company, which had executed a mortgage of its property to the Continental Trust Company. In pursuance of the terms of the consolidation, a mortgage of all its property was made by the consolidated company to the last-mentioned trustee, subject to existing liens. The agreement of consolidation reserved to the consolidated company the right to issue bonds for future acquired property as the successor of the gas company. The consolidated company filed a petition, in an *ex parte* proceeding in a Court of equity in which the trustee of the gas company mortgage had asked the Court to assume jurisdiction of the trust, setting forth that it had bought certain property and asked that the trustee be directed to certify and deliver certain bonds as being entitled to the lien created by that mortgage. This petition was opposed by the ap-

pellant on this appeal, who was the holder of bonds issued by the gas company before the consolidation. At the time of the consolidation the bonds which remained unissued by the gas company were those authorized for the payment of underlying mortgages and for the future acquisition of additional property. *Held*, that the effect of the consolidation was to extinguish the corporate existence of the gas company and to transfer its property to the consolidated company.

Held, further, that the right to discharge underlying mortgages by the issue of bonds under the gas company's mortgage may be exercised by the consolidated company as an incident to the title to the property it had acquired subject to the mortgage, and that the Court would have jurisdiction to direct the execution of bonds for that purpose.

Held, further, that the consolidated company is not authorized to issue bonds under the mortgage of the gas company in payment for property which was not acquired by that company but by the consolidated company, since the latter company cannot comply with the conditions fixed by the mortgage for the issue of such bonds, and the after-acquired property, for account of which bonds were authorized to be issued by the terms of the gas company's mortgage, means only property subsequently acquired by that company.

Held, further, that the holders of bonds issued by the gas company before the merger have a right to insist that none of the reserved bonds be issued except in conformity with the conditions fixed by the mortgage, which in effect constituted a contract between the gas company and them.

Held, further, that the trustee under the gas company mortgage, which did certify some bonds issued by the consolidated company for property acquired by it, is protected from liability therefor under the terms of the mortgage, which declared that the trustee should not be answerable except for its own wilful default.

Decided January 13th, 1910.

Appeal from the Circuit Court No. 2 of Baltimore City (HARLAN, C. J.).

Md.]

Argument of Counsel.

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

Albert C. Ritchie and Stuart S. Janney, for the appellant.

1. The only bonds which are secured by the Gas Company mortgage are the bonds of the Gas Company issued by it; the Gas Company has ceased to exist, and no power devolved upon the Consolidated Company to issue the bonds of an extinct corporation. The powers of the Consolidated Company are fixed by Code P. G. L., Article 23, section 46, which provides that the Consolidated Company shall have all the powers and rights of its constituent companies. While fully conceding this, we assert: That the powers of the Consolidated Company are not transmitted to it from the constituent companies, but are conferred upon it as a new grant, and are to be exercised by it as a new and distinct corporation.

It is apparent that the provisions of the general law under which the consolidation was effected, contemplate that the consolidated company formed thereunder shall be a new corporation, having such new capital stock as shall be agreed upon, and receiving, by virtue of the statute, a grant of all the powers and all the property of the constituent companies, and being subject to the debts and liabilities of the constituent companies.

It is well settled that where the statute contemplates the granting of corporate powers to the consolidated company, and the cancellation of the stock of the constituent companies, and the issue therefor of stock in the consolidated company, then the constituent corporations are dissolved and their corporate existence and powers extinguished immediately upon the consummation of the consolidation, and at the same time the consolidated company comes into being as a new corporation, with new powers and new franchises dating from that moment, and with a new capital stock. *Shields v. Ohio*, 95 U. S. 319-323; *Railroad Company v. Georgia*, 98 U. S. 359; *Keokuk & Western R. R. Co. v. Missouri*, 152 U. S. 301

(full discussion); *Yazoo & Mississippi R. R. Co. v. Adams*, 180 U. S. 1 (full discussion); *Shaw v. Covington*, 194 U. S. 593; *San Antonio Tr. Co. v. Altgelt*, 200 U. S. 304; *Rochester Ry. Co. v. Rochester*, 205 U. S. 236; *Yazoo & Mississippi Ry. Co. v. Vicksburg*, 209 U. S. 358; *Noyes, Intercorporate Relations*, sec. 60; *Cook on Corporations*, sec. 897; 10 Cyc. 302; *State v. N. C. Ry. Co.*, 44 Md. 131; *State v. Northern Central Ry. Co.*, 90 Md. 447; *Northern Central Ry. Co. v. State*, 93 Md. 737; *Northern Central Ry. Co. v. Maryland*, 187 U. S. 258; *State, use Dodson, v. Baltimore & Lehigh R. R. Company*, 77 Md. 489; *State v. Consolidated Gas Electric Light and Power Company*, 104 Md. 364.

The right to issue bonds is not property. *Richardson v. Green*, 133 U. S. 47; *Eastern Cable Co. v. Mfg. Co.*, 164 Mass.

There are many cases in which it has been held that the power of a constituent company to issue bonds passed to the consolidated company, and in some of them it has been said that this power could be exercised for the purpose of retiring obligations of the constituent companies, or for the purpose of completing the roads of the constituent companies. *Mead v. Railroad Co.*, 45 Conn. 199; *Taylor v. Railroad Company*, 57 How. Pr. 26; *Shaw v. Norfolk County R. R. Co.*, 16 Gray (Mass.) 407; *Camden, etc., Co. v. Burlington Carpet Co.*, 33 Atl. Rep. 478, 480 (N. J., 1905).

But in every one of these cases the power upheld was the power of the consolidated Company to issue its own bonds, not bonds of one of its constituent companies which had become extinct.

In *New Jersey Midland Ry. Co. v. Strait*, 35 N. J. L. 322, it was held that one entitled to receive the bonds of a railroad company could not be compelled by a company into which that railroad consolidated to receive its consolidated bonds. The consolidation had resulted in extinguishing the company, "and the consequence is, there is not the ability to perform the contract on the part of the (original) com-

Md.]

Argument of Counsel.

pany." In like manner, the present consolidation ended the ability to issue any more Gas Company bonds.

In *Parkinson v. West End Co.*, 173 Mass. 446, it appeared that a bondholder of a street railway company had the right to convert his bonds into stock of that company, and the road in question subsequently consolidated with another corporation under a statute making the new corporation "subject to all the duties, restrictions and liabilities" to which the constituent company was subject. It was held that the holder of the bonds of the first corporation could not maintain an action against the consolidated company for a refusal to deliver its preferred stock in exchange for the bonds. "A consolidation which makes no arrangement for furnishing stock in the new company and which ends the existence of the old ones, as a general rule, may be presumed to put an end to the right of bondholders to call for stock."

In *Tagart v. Northern Central Ry. Co.*, 29 Md. 557, this Court held that by the act of consolidation there before the Court the York and Cumberland Railroad Company "ceased to exist as a separate corporation so far as respected its powers to create or issue certificates of capital stock." The power to issue stock no longer existed, because the corporation itself no longer existed. Why, then, should the power to issue bonds of a corporation continue after the corporation itself has ceased to exist?

Particular provisions of the Gas Company mortgage render impossible the issue of the reserved bonds by the Consolidated Company. The form of the Gas Company bond is prescribed in the mortgage. It is to be the bond of "The Consolidated Gas Company of Baltimore City." It is that company which promises to pay the principal and interest, and it is the property and franchises of that company which are recited to be the security. The bond is to be executed by that company, through its president, and its seal attested by its secretary is to be attached, and it is the signature of its treasurer which is to be appended to the coupons.

Article IV, sec. 1 of the mortgage provides that all the bonds "shall be substantially of the tenor and purport above recited," and shall "be executed on behalf of the Gas Company by its president or vice-president, and its corporate seal shall be thereunto affixed and attested by the secretary." There is no longer any such corporation as the Consolidated Gas Company of Baltimore City. The Gas Company shall name an engineer, who shall furnish the trustee with a certificate stating that "such additional plant or property is desirable for the Gas Company to acquire in the profitable conduct of its business."

The directors of the Gas Company shall pass a resolution, reciting said certificate, and requesting the trustee to deliver the bonds to such officers of the Gas Company as shall be named in said resolution.

Here are express requirements that these reserved bonds shall only be issued upon the exercise by the directors of the Gas Company of a discretion conferred upon them, and upon the judgment of the Gas Company's engineer. Is not the proposition unanswerable that matters involving discretion can only be exercised during the existence of the persons in whom alone that discretion is reposed? The directors of the Gas Company have long since ceased to exist, and there is no longer any Gas Company in being which can appoint an engineer to exercise the discretion required by the mortgage to be exercised before these reserved bonds can be issued.

Moreover, the bonds can only be issued upon the engineer's certificate that the new property is desirable for the Gas Company in the profitable conduct of its business. There is no longer any Gas Company which can acquire property, and no longer any business conducted by the Gas Company. *Railroad Co. v. Maine*, 96 U. S. 499; *Harshman v. Bates County*, 92 U. S. 569; *N. J. R. Co. v. Strait*, 35 N. J. L. 322; *In re Strikeman's Will*, 96 N. Y. Supp. 460.

2. The Gas Company bonds reserved for the acquisition of additional property, at eighty per cent. of cost, can be issued only in case the property so acquired becomes subject to the

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lien of the Gas Company mortgage; therefore, in no event can these bonds be issued now, because additional property purchased by the Consolidated Company will become directly subject to the Power Company mortgage.

It is entirely clear that these \$5,500,000 reserved bonds could be issued for no other purpose than the one specified, and that by virtue of the covenants contained in the mortgage the additional property paid for (to the extent of eighty per cent. of cost) with their proceeds, must become directly subject to the lien of the mortgage. These requirements are part of the contract between the Gas Company and every holder of Gas Company bonds, and the issue of any of these reserved bonds for any purpose other than the acquisition of new property, or for new property which would not come directly under the Gas Company mortgage, would necessarily be a breach of this contract, and could be enjoined. *Pennock et al. v. Coe, Trustee*, 23 How. 129; *Basshor Co. v. Carrington, Receiver*, 104 Md. 629; *State v. Northern Central Rwy. Co.*, 18 Md. 212; *Machen, Corporations*, Vol. II, sec. 1930.

The Consolidated Company's contention that additional property now purchased, to the extent of eighty per cent. of cost, with the proceeds of the reserved Gas Company bonds, will become directly subject to the Gas Company mortgage, is based upon the fallacy of assuming that the Consolidated Company can be treated as the successor of the Gas Company alone as to the gas branch of its business, and as the successor of the Power Company alone as to the electric branch. In law the Consolidated Company is a new corporation, which has taken the place of two companies now extinct, and which combines in itself a gas franchise and an electric franchise by virtue of a new and separate grant to it. This corporation does not acquire property solely for its gas business or solely for its electric business, because these two lines of business have been granted as one united whole to the new company, and when that new company acquires property, it does so for its own business and its own purposes.

The result is that additional property acquired by the Consolidated Company cannot become subject to the lien of the Gas Company mortgage. That mortgage only covers additional property acquired by the Gas Company, and the Gas Company is extinct and can acquire no more property. Therefore, property acquired by the Consolidated Company, being acquired for its powers and purposes, must pass under its mortgage. *N. Y. Trust Co. v. Louisville, etc., R. Co.*, 102 Fed. Rep. 382; *Hinchman v. Point Defiance R. Co.*, 14 Wash. 349; *Pullman Co. v. M. P. R. Co.* 115 U. S. 587; *Shields v. Ohio*, 95 U. S. 319; *St. Louis, etc., R. Co. v. Gill*, 156 U. S. 649; *Shair v. Covington*, 194 U. S. 593; *In re Strikeman's Will*, 96 N. Y. Supp. 460.

3. If additional property purchased, at eighty per cent. of cost, with the proceeds of Gas Company bonds could become subject to the Gas Company mortgage, it could only be so to the extent of this eighty per cent., and as to the remaining twenty per cent. such property would become subject to the Power Company mortgage, thus breaking up the unity of the security of both mortgages.

4. The Gas Company bonds reserved for the acquisition of additional property cannot be issued for betterments; therefore the amount of such bonds proposed to be used for betterments can in no event be issued.

Edgar H. Gans and Charles Markell, for the Consolidated Gas, etc., Co., appellee.

1. The right to issue reserved bonds under the mortgage of April 1st, 1904, is a right of the Gas Company which passed to and is exercisable by the Consolidated Company by virtue of the consolidation of June 20th, 1906. *Code*, Art. 23, secs. 45 and 46; *State, use of Dodson, v. B. & L. R. Co.*, 77 Md. 491-2; *Consol. Gas. Co. v. Baltimore County*, 98 Md. 689.

Whatever may be the construction of special consolidations elsewhere, in Maryland at least the substitution of the new corporation for each of the old corporations in respect to all the rights, privileges and obligations of the old corporation is

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complete. So far as technical corporate existence alone is concerned, the old corporations have ceased to exist, and a new corporation has taken their place (*State v. Consolidated Gas Electric Light and Power Company*, 104 Md. 364). So far, however, as the rights and obligations of every kind, by contract or otherwise, of the old corporations are concerned—that is, so far as the old corporations are aggregations of rights and obligations, aside from any question of technical corporate existence—the old corporations continue to exist precisely as before. They exist with all their rights and obligations unchanged and unimpaired, not in their original separate corporate entities, but in the one new corporate entity, which embraces both the old corporations and the rights and obligations of both. In this sense, the Consolidated Gas Company of Baltimore City exists today; and in this sense only—as the possessor of certain rights reserved and the subject of certain obligations assumed—does the 1904 mortgage have to do with the Consolidated Gas Company of Baltimore City. Of course, in the sense of technical corporate existence, the Consolidated Gas Company of Baltimore City does not exist today; but the 1904 mortgage does not have to do with the Consolidated Gas Company of Baltimore City in that sense. The mortgage does not contain a single provision conditioned upon the technical corporate existence of that corporation; it does contain page after page defining rights and obligations of the Gas Company.

The Gas Company, as a corporate entity, cannot acquire additional property and cannot deliver a resolution of its board of directors; but the Consolidated Company, as successor of the Gas Company, can acquire property in precisely the same way for precisely the same purposes, and subject to precisely the same limitations and restrictions as the Gas Company could have acquired property. The Consolidated Company likewise in its distinct capacity as successor of the Gas Company can present a resolution of its board of directors requesting the exercise of its right, as successor to the Gas Company, to issue bonds.

The Consolidated Company, under its general corporate powers, may acquire property for any of its proper corporate purposes, whether those purposes be derived from the charter of either or both of the constituent companies by whose consolidation it was formed. The Consolidated Company, as successor of the Gas Company, can, however, only acquire property which the Gas Company could have acquired, for purposes for which the Gas Company could have acquired property. It is not in its general capacity as a corporation, but in its special capacity as successor of the Gas Company, that the Consolidated Company has the right to issue bonds under the 1904 mortgage. This distinction has been carefully observed by the Consolidated Company whenever it has issued bonds under the Gas Company mortgage.

The resolutions of the board of directors and the engineer's certificate have recited not simply acquisitions of property by the Consolidated Company, but acquisitions of property by the Consolidated Company in its capacity as successor of the Gas Company. The engineer's certificate has recited, not that the property acquired is desirable for the Consolidated Company to acquire in the profitable conduct of its business, but that it is desirable for the Consolidated Company to acquire in the profitable conduct of its gas business. That is,—to quote again from the *Dodson Case*,—"whatever appertained to either of the constituent bodies, now, in the same measure and under the same conditions, appertains to the composite body." *Prouty v. Ry. Co.*, 52 N. Y. 363; *Boardman v. Ry. Co.*, 84 N. Y. 181.

The notion that a successor by consolidation cannot avail itself of rights under a contract in which only the predecessor corporation is mentioned, and no rights are expressly reserved to a successor by consolidation, finds no support in the authorities. The Maryland cases already quoted are incompatible with such a notion, and, of themselves, make it impossible for that notion to receive the approval of this Court. The authorities elsewhere also firmly establish the right of a

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successor corporation to exercise contractual rights reserved or conferred only in the name of a predecessor corporation.

An important series of decisions on the effect of a consolidation upon rights conferred, by contract or otherwise, in the name of one of the consolidating companies is the so-called *Township and County Bond Cases* in the Supreme Court of the United States. *Scotland County v. Thomas*, 94 U. S. 682; *East Lincoln v. Davenport*, 94 U. S. 801; *Schuyler County v. Thomas*, 98 U. S. 169; *Wilson v. Salamanaca*, 99 U. S. 499; *Empire v. Darlington*, 101 U. S. 87; *Menasha v. Hazard*, 102 U. S. 81; *Harter v. Kernochan*, 103 U. S. 562; *New Buffalo v. Cambria Iron Co.*, 105 U. S. 73; *Bates County v. Winters*, 112 U. S. 325; *Livingston County v. Portsmouth Bank*, 128 U. S. 102.

These ten cases present a great variety of facts, but in each case was involved the validity of township or county bonds issued as a subscription to stock of or as a donation to a railroad company. In each case there was a statute authorizing a stock subscription or donation, as the case might be, to one corporation, but the bonds were actually issued to a successor corporation formed by consolidation. In each case the subscription or donation and the bonds issued therefor were held valid. The various statutes were regarded as conferring not only a right on the public authorities to make a subscription or donation, but also a correlative right on the railroad company to receive such subscription or donation and the bonds therefor. This latter right was one of the rights and privileges which passed to a successor by consolidation.

It is, at least, no more difficult, in the strict literal and verbal sense, for an extinct corporation to acquire property and issue bonds than it is for an extinct corporation to issue stock and perform a subscription contract. Stated in just that form, both are, literally, impossible; but, substantially, through its successor by consolidation, the extinct corporation can, in the eyes of the law, acquire property and issue bonds or stock under and pursuant to a contract which mentions

only the predecessor corporation. In either case, the successor corporation issues its bonds or its stock, as its own corporate act, but only in the right of the predecessor corporation.

The 1904 mortgage confers not a power of attorney or authority from principal to agent to issue bonds, but a vested right, which, therefore, passes to the Consolidated Company. But even were this not so, yet, under the *Livingston County Case*, "the provision for consolidation" by existing statute, became a part of the mortgage. In fact, the consolidation statute was not only in this way a part of the mortgage, but was actually brought to the attention of the parties by the recital, on the first page of the mortgage, of the two previous consolidations, which resulted in the formation of the Gas Company. See also *Eastern Ry. v. Cochran*, 9 Exch. 197.

2. The right to issue further bonds under the 1904 mortgage of the Gas Company is not restricted by the provisions of Article 4, section 4 of the Supplemental Indenture of the Power Company dated May 15th, 1905. *Clafin v. So. Car R. Co.*, 8 Fed. Rep. 118.

Even if there were—as we submit there is not—doubt as to the meaning of the language in question, it must be remembered that in the supplemental indenture of further assurance, dated November 19th, 1906, from the Consolidated Company to the Continental Trust Company, trustee, the right is expressly reserved to issue the unissued bonds under the 1904 mortgage. As already stated, this indenture by way of further assurances was executed on the demand of the Continental Trust Company, trustee, pursuant to the express provisions of the Supplemental Indenture calling for the execution, by the company formed by consolidation, of such indenture as might be required by the trustee. In demanding and accepting such indenture, which was the method provided by the Supplemental Indenture of May 15th, 1905, for perfecting the lien intended to be secured by Article 4, section 4 of that Supplemental Indenture, the Continental Trust Company, as trustee, represented the bondholders, who

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are, therefore, bound by the construction put upon the Supplemental Indenture by the trustee, and by the reservation in the indenture of November 19th, 1906, of the right to issue unissued bonds under the 1904 mortgage. *Baltimore City v. United Rys. Co.*, 108 Md. 64, 70; *Elwell v. Fosdick*, 134 U. S. 500.

Henry W. Williams, for the Fidelity and Deposit Co., trustee.

SCHMUCKER, J., delivered the opinion of the Court.

The proceeding before us is an *ex parte* one instituted in Circuit Court No. 2 of Baltimore City by the Fidelity and Deposit Company of Maryland (hereinafter called the Fidelity Company) as trustee under a mortgage deed of trust made to it by the Consolidated Gas Company of Baltimore City (hereinafter called the Gas Company). The purpose of the proceeding is to procure the execution of the trusts of the mortgage under the direction and supervision of the Court.

There is no question that in cases of express trusts the trustee, if in doubt, may, for his protection, apply to a Court of equity for a construction of the instrument creating the trusts and for their execution under the Court's direction and supervision. Cases of that class form an exception to the general rule that Courts of equity will not declare future rights but will leave them to be determined when they come into possession. As was said in *Cross v. Del Valle*, 67 U. S. 1: "In such cases, from necessity and in order to protect the trustee, the Courts are compelled to settle questions of the validity and effect of contingent limitations in a will (which was the form of instrument creating the trusts there involved) even to persons not *in esse* in order to make a final decree and give proper instructions in relation to the execution of the trusts. *Bowers v. Smith*, 10 Paige, 200. It is this necessity alone which compels a Court to make such cases an exception to the general rule." Even in such cases, however, where the

persons whose rights are to be affected by the Court's action are *in esse* and within the reach of its process the fundamental principles of equity jurisdiction require that they must be made parties to the suit in person or by representation in order to bind them by the decrees or orders to be passed therein.

Keeping these principles in view we will proceed to the consideration of the issues presented by the present appeal, which is not from the decree assuming jurisdiction over the trust estate but from an order subsequently passed directing the trustee to certify and deliver certain bonds in performance of its duties under the mortgage creating the trusts.

The material allegations, of the trustee's petition on which the Court took jurisdiction in the case, may be briefly stated as follows:

The Gas Company was created on May 5th, 1888, by the consolidation, under the provisions of the general corporation laws of this State, of three pre-existing corporations which may be designated as having been the "Baltimore," the "Chesapeake" and the "Equitable" gas companies. On April 1st, 1904, the corporation thus formed made the mortgage deed of trust, already mentioned, to the petitioner to secure a proposed series of bonds amounting in the aggregate to \$15,000,000, to be issued for the purposes, at the times and upon the terms and conditions in the mortgage set forth.

On June 20th, 1906, after that mortgage had been made but before all of the bonds to be secured by it had been issued, the Gas Company was, itself, consolidated under the general corporation laws of the State, with another Maryland corporation known as the Consolidated Gas Electric Light and Power Company (hereinafter called the "Power Company") thus forming the now existing corporation, the Consolidated Gas Electric Light and Power Company of Baltimore which we will hereinafter call the "Consolidated Company."

One of the terms of the last mentioned consolidation was that, immediately upon its completion, "all the property and franchises of the Gas Company" should pass, "subject only to

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such liens on such property as existed prior to this consolidation," to the Continental Trust Company as trustee under a mortgage which had theretofore, on February 14th, 1905, been executed to it by the Power Company and also under a supplemental mortgage which had been executed to it by the Power Company on May 15th, 1905, to secure the payment of \$15,000,000, of bonds of that company referred to in said original and supplemental mortgages.

The Consolidated Company, the now existing corporation, in pursuance of the terms of its incorporation executed on November 19th, 1906, a supplemental mortgage, of all of its property of every kind and description, except certain specified parcels of land, subject to existing liens thereon, and also all property and franchises which it might thereafter acquire, to the Continental Trust Company as trustee under the above mentioned mortgage and supplemental mortgage, which had been made to it by the Power Company on February 14th and May 15th, 1905, to be held subject to the terms and for the purposes of said mortgages.

The mortgage of April 1st, 1904, from the Gas Company to the petitioner, conveyed in terms not only the property of every kind then owned by the Gas Company but also such as it might thereafter acquire and both that company, during its existence, and since then the Consolidated Company have from time to time executed conveyances of property thereafter acquired to the petitioner upon the trusts of said mortgage of April 1st, 1904.

Certified copies of the deeds, mortgages, and instruments of consolidation mentioned in the petition were filed with it as exhibits and appear in the record.

The petition, after making the allegations of facts aforesaid, states that "by reason of the various mortgages or deeds of trust prior to and subsequent to the mortgage or deed of trust to your petitioner as trustee, and by reason of the consolidation" by which the Gas Company was formed "your petitioner has been in doubt as to its duties, rights and obligations as trustee and more especially your petitioner has been

in doubt as to its rights, and duties with reference to the certification of further bonds under said mortgage deed of trust" at the request of the Consolidated Company, and it is therefore desirous of executing its trusts under the direction and supervision of the Court. It then prays the Court to take jurisdiction of the trusts of the mortgage and their execution and of the trust property and for further relief.

Upon the filing of the petition and accompanying exhibits the Court passed a decree declaring "that relief be granted as prayed in said petition and that the Court do hereby assume jurisdiction over the trust" created by the mortgage of April 1st, 1904, from the Gas Company to the petitioner and over the property now or hereafter to be held in trust under it and over all of the acts of the petitioner as trustee under it.

As the allegations of the petition are of a general nature it is necessary to refer to the contents of some of the exhibits in order to arrive at an accurate understanding of the questions presented by it.

An inspection of the mortgage of April 1st, 1904, from the Gas Company to the petitioner, for the execution of whose trusts the aid of the Court is invoked, shows that it was made to secure the payment of 15,000 bonds for \$1000 each which were to be executed by the Gas Company and on each of which the trustee was to endorse a certificate that it was one of the series of bonds secured by the mortgage. Of these bonds 1015 were to be forthwith certified by the trustee and delivered to the Gas Company upon its order. Of the remainder 1,500 bonds were to be applied to the redemption of outstanding certificates of indebtedness of the company,—6,895 bonds were to be used to take up and retire, as they matured, outstanding bonds which were secured by underlying mortgages on the company's property, and 5,500 bonds were from time to time to be issued to pay eighty per cent. of the cost of property to be thereafter acquired by the company.

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Before any bonds could be issued for the purchase of after-acquired property the trustee must be furnished with the certificate of an engineer appointed by the Gas Company, and also, at its option, of an engineer to be appointed by it, stating that the plant or property proposed to be purchased is desirable for that company to acquire in the profitable conduct of its business and also stating the actual cost of the property, and the trustee must also be furnished with a resolution of the directors of the company reciting the engineers' certificates and requesting the trustee to deliver the bonds. The mortgage also contains covenants on the part of the mortgagor to make all needed and proper betterments and improvements, to keep the mortgaged property and appliances in such thorough repair that their efficiency shall at no time become impaired, to pay off all taxes, prior lien bonds, liens and incumbrances and to convey to the trustee upon the trusts of the mortgage all property thereafter acquired by the company whether the same be appurtenant to its business or not.

Among the other provisions of the mortgage is to be found one exempting the trustee from liability or responsibility for any acts or defaults of the Gas Company its servants or agents and further providing "*nor shall the trustee be held liable for any acts, defaults or misconduct of any agents or persons employed by it, unless chargeable with gross negligence in the selection or continuance of their employment, nor shall the trustee be answerable except for its own wilful default or gross misconduct.*"

From an examination of the agreement and certificate of June 20th, 1906, for the consolidation of the Gas and Power Companies it appears that not only did the property of those two companies pass to the Consolidated Company subject to the then existing liens thereon, but that in the process of consolidation all of the property of the Consolidated Company was subjected to the further liens of \$700,000, of Prior Lien Preferred Stock and \$11,616,774 of preferred stock of that company which were to have priority over all subsequently created mortgages or incumbrances, but to be subject to ex-

isting mortgages upon the properties of the consolidating companies and to the lien of the bonds thereby secured whether theretofore issued or thereafter to be issued in accordance with the provisions of said mortgages. The agreement of consolidation further declares in that connection that the right is thereby "expressly reserved by the Consolidated Company as the successor of the Gas Company and the Power Company to issue said bonds," but does not attempt to modify the conditions fixed by the mortgage as the only ones upon which bonds can be issued for the respective purposes therein mentioned.

As neither the Power Company nor the Continental Trust Company, trustee under the Power Company's mortgages of February 14th and 15th, 1905, nor any of the holders of bonds secured thereby are parties to this proceeding and we therefore shall not pass upon their rights if any they have in the premises. We forbear to further comment upon the terms of those mortgages than to mention the fact that they distinctly provide for a possible consolidation of that company. They declare that, if in that event the Consolidated Company assume the payment of the mortgage debt, and the performance of the mortgage covenants, it shall succeed to and be substituted for the Power Company with the same effect as if it had been named therein as mortgagor and may cause to be signed and issue either in its own name or that of the Power Company any or all of the mortgage bonds which shall not theretofore have been issued and that the trustee shall certify and deliver such bonds as if they had been executed by the Power Company before the consolidation. No such provisions nor any of like tenor and effect appear in the Gas Company's mortgage of April 1st, 1904, to the petitioner whose trusts are now being executed in this case.

Under the operation of the conveyances to which we have referred, the Consolidated Company at the time of the institution of the present suit held the property acquired by it from the Gas Company in the process of consolidation sub-

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ject *first* to the liens created thereon by the Gas Company, *secondly* to the lien of the \$15,000,000 mortgage from the Power Company to the Continental Trust Company, trustee. and *thirdly* to the lien of its own prior lien and preferred stocks amounting to over \$12,000,000. The Consolidated Company had also conveyed in broad terms to the Continental Trust Company, as trustee under the Power Company's mortgages, *all property to be thereafter acquired by it*, "subject only to liens existing thereon prior to June 20th, 1906."

On July 3rd, 1907, the Consolidated Company filed a petition in the proceeding before us stating that, since the making of the Gas Company's mortgage of April 1st, 1904, that company and the Consolidated Company as its successor had acquired certain property, without designating the respective portions thereof acquired by the several companies, and asserting a right on the part of the Consolidated Company to hold the property as the successor of the Gas Company. The petition further stated that the Consolidated Company had furnished to the Fidelity Company as trustee under the mortgage in pursuance of the terms thereof a certificate of an engineer and a copy of a resolution of the directors of the Consolidated Company touching such after-acquired property and had requested the trustee to certify and deliver on account thereof two hundred and twenty-five of the bonds called for by the mortgage, but that the trustee expressed doubts as to its right to certify the bonds under the circumstances and declined to do so without an instruction from the Court to that effect. Copies of the engineers' certificate, and the resolution of the directors were filed as exhibits with the petition.

The petition then prayed for an order on the trustee to show cause why it should not certify and deliver the bonds.

On the same day an order was granted as prayed for and the Fidelity Company as trustee, answered the petition asserting as grounds for its refusal to issue the bonds, *first* doubts as to whether under the terms of the consolidation of the Gas and Power Companies, the Power Company mort-

gage to the Continental Trust Company was or not a prior lien on the property in question over any bonds issued under Gas Company's mortgage after the consolidation; *secondly* as to whether, since the Gas Company has gone out of existence, property acquired by the Consolidated Company can be regarded as property of the Gas Company within the meaning of its mortgage of April 1st, 1904, and *thirdly* because the articles of consolidation do not make any express provision for determining how future bonds under that mortgage should be issued and certified.

On the same day an order was passed by the Court, upon the petition, exhibits and answer, directing the trustee to certify and deliver the bonds.

On September 30th, 1909, the Consolidated Company filed in the case a second and similar petition saying that it had from time to time acquired, as successor of the Gas Company additional property and that under orders of Court similar to the one just mentioned bonds under the Gas Company's mortgage had been issued and certified on account thereof and that it had acquired still further property as successor of the Gas Company and had also acquired five of the underlying bonds secured by the mortgage of April 1st, 1904, and that it desired to have bonds certified and delivered to it by the trustee to whom it had tendered the said five bonds for exchange for bonds so to be certified and delivered. An engineer's certificate and resolution of directors of the Consolidated Company touching the last mentioned acquisition of property were filed as exhibits with that petition. The petition further alleged in general terms that all of the property acquired by the Consolidated Company on account of which bonds had been certified and delivered to it by the Fidelity Company as trustee under the Gas Company's mortgage as well as the property for which it then asked an issue of bonds to it, consisted of either additions or improvements to real estate which had been already subjected to the Gas Company's mortgage, or of new property which the Consolidated Company had after its acquisition conveyed to the Fidelity

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Company as trustee for the uses and purposes of the Gas Company's mortgage by which the bonds so issued were secured.

The Fidelity Company as trustee under the Gas Company's mortgage answered that petition admitting its allegations, but before it was acted on by the Court, Albert Diggs, as holder of five bonds which had been issued under the Gas Company's mortgage and acquired by him while that company was still in existence, intervened in the case by filing a petition opposing the further issue of bonds asked for.

Mr. Diggs' petition after reciting at considerable length the terms and provisions of the Gas Company's mortgage and the events of the subsequent consolidation of that company with the Power Company, insisted that the Consolidated Company was entirely without power to issue bonds so as to come within the operation of the Gas Company's mortgage which was a valid security for only such of the bonds therein described as were outstanding at the time of the consolidation. That assertion was based mainly upon the provision in the articles of consolidation that immediately upon the consolidation all of the property of the Gas Company was to pass to and vest in the Continental Trust Company as trustee under the Power Company's mortgage subject only to such liens thereon "as may have existed prior to the consolidation," which Mr. Diggs insisted amounted to a prohibition of the issue after the consolidation of any further bonds as liens upon the Gas Company's property.

He also contended that the alleged unlawful issue of such bonds would, if permitted to be made, dilute and impair the security and diminish the value of his bonds which had been issued prior to the consolidation.

The Fidelity Company as trustee answered Diggs' petition denying the soundness of his contention and calling in question his right to assert the claims of the Power Company.

The Court passed an order directing the trustee to certify and deliver the bonds prayed for in the Consolidated Com-

pany's petition. From that order Diggs took the present appeal.

Turning now to the consideration of the legal and equitable questions presented by the record it is to be observed that neither the form nor scheme of the Gas Company's mortgage is of doubtful validity or unusual in character. It has been settled by decisions in this State and elsewhere that an owner of property may, by a deed of trust in the nature of a mortgage, subject it to a lien for the payment of future debts or obligations. *Bank v. Lanahan*, 45 Md. 396; *Conard v. Atl. Ins. Co.*, 26 U. S. 387; 27 *Cyc.* 1069-1071; 20. *A. & E. Encycl.*, 923; *Jones v. N. Y. Guarantee & Indemnity Co.*, 101 U. S. 626.

The recent cases generally hold that railroad and other corporations have the power to mortgage future acquired property and that in such cases as soon as the property is acquired by the mortgagor company the lien of the mortgage will be regarded in equity as fastening upon it. 33 *Cyc.* 487; 27 *Cyc.* 1141; *Trust Co. v. Kneeland*, 138 U. S. 414, 419; *R. R. Co. v. Hamilton*, 134 U. S. 296; *Brady v. Johnson*, 75 Md. 455; *Butler v. Rahm*, 46 Md. 548.

If the Gas Company had not gone out of existence after making the mortgage all of the bonds contemplated by it would doubtless have been issued without difficulty or question. The destruction of that company which occurred in its consolidation with the Power Company has, by removing some of the agencies requisite for the further issue of bonds, introduced into the situation its present embarrassing features. The first step to be taken for relief from that embarrassment is to ascertain the true nature and effect of such a consolidation.

Both the statute under which this consolidation was made and the decisions of this Court in construing similar consolidations require us to hold that the corporate existence and powers of both the Gas and the Power Company perished in the process of consolidation and that the resultant Consolidated Company was a new and separate corporation and that

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the rights then conferred on it were acquired by a new and special grant from the State and did not accrue to it by way of transfer from the constituent corporations or either of them.

Section 46 of Art. 23 of the Code under which the consolidation was made provides that when the certificate of union shall have been properly executed and recorded: "All the property and assets belonging to said former separate corporations of whatsoever nature and description and all the powers and rights and all the debts and liabilities of the former separate corporations of whatsoever nature and description shall upon such recording as aforesaid be devolved upon said new consolidated corporation and every devise or bequest in favor of either of the former separate corporations and which said former separate corporations would have been capable of taking shall devolve upon said new consolidated corporation, which shall be regarded as substituted by operation of law in the room and stead of said former separate corporation."

In the case of the *State v. The Consolidated Gas Electric Light and Power Company*, 104 Md. 364, it was held by us that the very consolidated corporation with which we are now dealing, was a new corporation and as such was liable for the bonus tax, imposed by sec. 98 of Article 81 of the Code upon corporations as a condition precedent to commencing to do business. We have also held to be new corporations other consolidated companies formed under the same or similar statutes in the case of *State, use of Dodson. v. B. & L. Ry. Co.*, 77 Md. 487, and in three cases of the *State v. Northern Central Ry. Co.*, appearing respectively in 44 Md. 131, 90 Md. 447 and 93 Md. 737. Our decision in those cases is in accord with the great weight of authority. 10 Cyc. 302; *Yazoo & Miss. Ry. Co. v. Vicksburg*, 209 U. S.; *Rochester Ry. Co. v. Rochester*, 205 U. S. 256; *Keokuk & Western Ry. Co. v. Missouri*, 152 U. S. 301.

We held in *State, use of Dodson, v. B. & L. R. R. Co.*, 77 Md. 489, and *Consolidated, etc., Co. v. Baltimore County*,

98 Md. 689, that the new corporation, which comes into being by a consolidation of corporations made under the general corporation laws of this State, comprehends both of the constituent corporations which then ceased to exist and is in effect both united in one, and that nothing was destroyed by the consolidation, and that it was the purpose of the Legislature in providing for such consolidations to enable the constituent corporations to do more efficiently what they had done before and not to deprive them of any rights or property which they previously had. It is however true that the means adopted by the Legislature to carry into effect its purposes involved *the extinction of the life of the constituent corporations* and the creation of a *new corporation which is a legal unit* and not a mere association or aggregation of coexisting corporations. The rights and powers received by it, from the State, at its formation, although identical in character with those which had been possessed by the extinct constituent corporations, are its own rights and powers and are exercisable by it alone. The property and franchises formerly held by the extinct constituent corporations, which devolved through the consolidation on the new corporation, thereby became its own and are held by it in its own right with the same powers of use and disposition as those enjoyed by other corporate owners of property and the respective portions of it which came from the several constituents no longer have any separate legal existence. It may in its discretion apply particular portions of its property to like uses and in the same enterprises to those in which they had been formerly employed by the constituent corporations from which they came. but in so doing it holds and uses the property in its own right and on its own account and not as and for the extinct constituent corporation or in a special capacity as its successor.

The Gas Company's mortgage made provision for the liquidation of all prior liens existing at the date of its execution and it is sufficient for the purposes of this case to consider the extent of the lien created by that mortgage. No question

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is suggested as to the lien of the mortgage for such bonds as were issued in conformity with its provisions during the existence of the corporate life of the mortgagor. The only bonds which remained unissued when the Gas Company became extinct were those authorized either for the retirement of bonds secured by underlying mortgages or for the future acquisition of additional property. We will consider the right to issue bonds for those two purposes in the order in which we have named them.

The mortgage itself definitely specifies the number and limits the amount of bonds which may be issued under it to retire prior lien bonds. It prescribes no other terms for the issue of new bonds, for the retirement of the prior lien ones, than that whenever the Gas Company, which was the owner of the mortgaged property, should acquire any of the prior lien bonds and tender them to the trustee it should certify and deliver in exchange therefor a like amount of the bonds provided for by the mortgage. That is a right which may with propriety be held to be exercisable by any subsequent owner of the property, individual or corporate, whether the ownership had been acquired by purchase or consolidation or in any other lawful manner. Such right may well be regarded in equity as an incident of the title to the property so long as it remained subject to mortgage.

If the Gas Company executed the bonds called for by its mortgage and lodged them with the trustee, before it went out of existence, the trustee may without further proceedings certify and deliver them in exchange for an equal amount of prior lien bonds to the extent authorized by the mortgage at any time while that instrument remains in force. If however the bonds have not been executed by the Gas Company then, as that company in its mortgage assumed the obligation of the prior lien bonds and also agreed to retire them as in the mortgage set forth, there would be jurisdiction in a Court of equity, upon a proper application to it, to direct their execution either by a trustee to be appointed for that purpose, or by the Consolidated Company if the Court should so direct.

But as the power to compel the performance of that agreement is not an incident of the Court's advisory jurisdiction over the execution of trusts it could not ordinarily be invoked in such an *ex parte* proceeding by the trustee as the one now before us. In order, however, to avoid a multiplicity of suits the Court below may entertain such an application, if it is desired, in the present case upon the last petition filed by the Consolidated Company if it be so amended as to bring before the Court in person or by proper representation the holders of subsequent liens upon the property owned by the Gas Company at the date of the consolidation. We think that their interests are sufficiently involved, in the application to now authorize the execution and issue of further bonds under the extinct Gas Company's mortgage, to require that they should receive notice and have an opportunity to be heard in order to be bound by such decree as may be passed under the application.

The question of the right to now execute and issue bonds under the Gas Company's mortgage in payment for property, which was never acquired by that company but has been acquired by the Consolidated Company since its formation, presents far greater difficulties. Under the terms of the mortgage such bonds could be issued only on account of property thereafter acquired by the Gas Company and then only upon conditions, already mentioned by us, to be performed in part by the directors of that company and in part by an engineer to be selected by it. Furthermore the mortgage imposes no obligation upon the company to apply for any bonds, in case it made future acquisitions of property, or to make any such acquisitions. Its status under the mortgage in reference to an application to the trustee for the certification and delivery of any such bonds was a purely voluntary one, the whole matter resting in its discretion.

It is clear that no bonds can now be issued for after-acquired property in exact accordance with the terms prescribed by the mortgage itself because of the termination of the corporate life of the Gas Company.

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It was ably contended on the brief and at the hearing on appeal in behalf of the Consolidated Company that it had acquired in the process of the consolidation the right of the Gas Company to issue and have certified reserved bonds under the mortgage and that such right had been exercisable by it ever since the consolidation.

It insists, in that connection, that it is only "so far as their technical corporate existence is concerned" that the constituent corporations, the Gas and Power Companies have ceased to exist and the consolidated one has taken their place. It also insists that "so far however as the rights and obligations of every kind, by contract or otherwise, of the old corporations are concerned, that is, so far as the old corporations are aggregations of rights and obligations apart from any technical questions of corporate existence the old corporations continue to exist precisely as before. They exist with all their rights and obligations unchanged and unimpaired, not in their original corporate entities but in the one new corporate entity which embraces both the old corporations and the rights and obligations of both."

For the reasons mentioned the Consolidated Company contends that it, as the one new corporate entity, can effectually perform the conditions required of the Gas Company by the mortgage to make valid issues of bonds for account of after-acquired property. It insists that this is true even though the property be acquired by it after the Gas Company has gone out of existence, because it can acquire the property in its capacity of successor of the Gas Company in the same manner, for the same purposes and subject to the same restrictions as the Gas Company could have acquired it.

It is further urged in support of this view that the mortgage does not in the provisions relating to the class of bonds now under consideration, refer to the Gas Company in an exclusive sense with the intent to exclude any other corporate entity even a successor by consolidation, but that it is apparent from the whole conveyance that the Gas Company was referred to only as the owner of the property conveyed and

the possessor of the rights reserved and the subject of the liabilities assumed under the mortgage.

In support of the position thus taken reference is made to the decisions of the United States Supreme Court in the series of ten cases, frequently designated the *Township and County Bond Cases*, beginning with *Scotland County v. Thomas*, 94 U. S. 682, and ending with *Livingston County v. Portsmouth Bank*, 128 U. S. 102. Those cases upon examination do not appear to be precisely in point as they present no question of the identity of the party authorized to issue bonds. They merely decide, under a variety of facts and different statutes, that municipal aid, authorized to be given to a designated railroad company by way of stock subscription or donation as an inducement to or in consideration of acts, supposed to be beneficial to the municipality granting the aid, may be validly paid or delivered to a successor corporation under a consolidation when the beneficial acts have been done or completed by the latter corporation.

The right of a consolidated corporation to receive aid intended for one of its constituent corporations also differs materially from the right here claimed by the Consolidated Company to secure the benefit of the lien of a mortgage made by one of its constituent companies, by issuing the bonds of that company under different conditions from those prescribed in the mortgage.

We are unable to yield our assent to the contentions of the Consolidated Company in this connection. It cannot acquire and hold property in a special capacity as successor of the Gas Company. As we have already said, property acquired by it is not charged with a trust in favor of that one of its constituents which formerly conducted the particular business in connection with which such property is to be used. Its property when acquired is not held in special capacities but is completely its own and may be applied to such uses as it sees fit. Such property would be subject to the operation of any general mortgage or conveyance made by the company of its entire estate. An acquisition of property by the Consolidated

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Company is therefore not the same thing that an acquisition by the Gas Company prior to the consolidation would have been.

Nor do we think it can be assumed that the Gas Company intended that its successor by consolidation, if it should have one, might execute for it and as its act the bonds called for by the mortgage of April 1st, 1904, because of the absence from the mortgage of any stipulations negating such an intent. Better might it be said that the failure to express any such intention in the mortgage, as was done in the Power Company's mortgage to the Continental Trust Company, establishes the fact that no such intention existed. The burden of proof of the intention is upon him who asserts its existence.

The Gas Company being under no obligation, when it made its mortgage, to issue bonds for after-acquired property, had the right to fix such conditions precedent to an issue of that character as it saw fit, and the Court cannot compel their issue upon any other conditions. Furthermore, the holders of bonds issued by the Gas Company, while it was still in existence, have a right to insist that none of the reserved bonds be issued except in conformity with the conditions fixed by the mortgage which in effect constituted a contract between the Gas Company and them. *Butler v. Rahm*, 46 Md. 541.

In the case of *Emery et al. v. Owings*, 7 Gill, 488, this Court held that where the parties themselves had stipulated in a mortgage the method of ascertaining the amount for which it was to be a lien on the property covered by it, a Court of equity had no jurisdiction to compel them to adopt any other mode, and the parties having failed to ascertain the amount in the prescribed manner, it was held that the mortgage created no lien on the land.

The practical question, therefore, before us on this branch of the case is whether the facts appearing in the record can be considered as showing a compliance with the conditions fixed by the mortgage for the issue of the class of bonds now

under consideration. That question we must answer in the negative.

As was said in *N. J. Midland R. R. v. Strait*, 35 N. J. L. 322: "Consolidated companies cannot in the nature of things be the same as any one of their constituents." The constituent conducted its own business and applied its capital and revenues to its enterprises alone. The Consolidated Company manages as its own and for its own account the enterprises and occupations formerly conducted by all of its constituents. It receives the revenues from all of them and devotes those revenues to strengthening and advancing such particular ones of the whole number of its enterprises as it elects, or to the promotion of new enterprises within any of its corporate powers, or to its general uses. It may well be supposed that the Gas Company, when it made its mortgage, did not intend its own property to be burdened by liens to raise funds for the use of a successor of so much wider scope and larger needs.

In *New York Security and Trust Company v. Louisville, etc., R. R. Co.*, 102 F. R. 382, two railroad companies, on the property of each of which there was a mortgage, entered into a consolidation, and the new company thereby formed made a general mortgage upon the combined properties. All three of the mortgages covered after-acquired property. A controversy arose between the trustees of the three mortgages as to the proper disposition of equipment purchased by the consolidated company. The trustees of the two underlying mortgages which had been made by the constituent companies contended that a proportionate part of the equipment should be deemed to have come under each of the divisional mortgages, but the Court rejected the contention, saying: "The after-acquired property clause in each of the mortgages can be rightly construed, I think, to apply only to property subsequently acquired by the mortgagor. The consolidated company is a new and different organization. The case of *Hinchman v. Railway Co.* (Wash.), 44 Pac. 867, is quite in point, and in principle the question seems to be cov-

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ered by the decision in *Pullman Pal. Car Company v. Missouri Pac. Ry. Co.*, 115 U. S. 587."

We think that in the present case also the after-acquired property for account of which bonds were authorized to be issued by the terms of the Gas Company's mortgage should be construed to mean only property subsequently acquired by that company. As that company put it out of its power to acquire any more property when it surrendered its corporate existence by entering into the consolidation, that action on its part is conclusive of this branch of the case.

The conclusion which we have thus reached is in our judgment not only sound in principle, but its application to cases like the one now before us will be promotive of simplicity in the management of corporate affairs. In the present case each one of the constituent corporations was itself the result of the consolidation of several earlier ones. If the property and affairs of each of the corporations which have participated in the successive unions that finally produced the Consolidated Company were to be treated as still having in effect a separate existence, or the rights and powers of each corporation were to be regarded as still subsisting as separate aggregations, although its technical corporate existence has ceased, it is practically certain that great confusion would result.

If we are correct in our conclusion that the Consolidated Company cannot for the purpose of the issue of these bonds be considered as the same as the Gas Company, the acts on the part of the directors of the latter company which are, by the terms of the mortgage made requisite to the issue of the bonds cannot be performed by the directors of the former company, and for that reason also no more of that class of bonds can be issued under the Gas Company's mortgage. The Consolidated Company is, it is true, thus left to finance its own transactions, upon the credit of its own property and resources. It is more directly in accordance with sound business principles that such should be the case than to permit the new company to run the risk of confusion and embarrass-

ment incident to an effort to revivify and utilize the credit of its extinct constituents.

The remaining contention of the Consolidated Company is that the right to issue further bonds under the Gas Company's mortgage is not restricted by the provisions of Art. 4, sec. 1, of the supplemental conveyance of May 15th, 1905, from the Power Company to the Continental Trust Company, as trustee for the holders of the Power Company's bonds. The reasoning and authorities relied on in support of that view may be regarded as going far toward its establishment, but, as neither any of the bondholders of the Power Company nor their trustee are before us in this proceeding, we will not pass upon the question thus presented to us.

We think that, under the terms of the Gas Company's mortgage and the authority of the orders of Court under which it acted, the Fidelity Company, as the trustee therein named, is protected from liability for the certification and delivery of such bonds for account of after-acquired property as were issued since the consolidation, but prior to the order from which the present appeal was taken. Without meaning to intimate an unfavorable view of the rights of the holders of those bonds, we refrain from expressing any opinion in reference to their status, as none of them are parties to the case, nor can the Fidelity Company, which filed the *ex parte* petition on which the proceeding was instituted, be regarded as fully representing them for the purposes of an inquiry into their status as holders of bonds issued under those circumstances.

The order appealed from must be reversed and the case remanded for further proceedings.

Order reversed with costs and case remanded for further proceedings in accordance with this opinion.

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Syllabus.

WILLIAM J. GARLAND vs. STATE OF MARYLAND.

Conspiracy to Obstruct Administration of Justice—Sufficiency of Indictment—Evidence.

The common law offense of conspiracy consists of an unlawful combination and agreement. The agreement may be to commit a crime or to do a lawful act by criminal or unlawful means, but in neither case is an overt act necessary to the completion of the offense. When the object of the combination is to commit a crime or do an unlawful act, the means by which it is to be accomplished are immaterial, the offense being the unlawful agreement to do an unlawful thing.

In an indictment charging the common law offense, the means by which the object is to be accomplished need not be stated, and in stating the object of the conspiracy, it is not necessary to set out the offense with the accuracy or detail which would be required in an indictment for that offense.

This rule does not apply to conspiracies to do a lawful act by unlawful means, but in such case it must appear by the indictment that the means to be employed are unlawful.

To obstruct the due administration of justice is an indictable offense at common law, and Code, Art. 27, sec. 28, provides for the punishment of every person who shall corruptly obstruct or impede, or endeavor to obstruct or impede, the due administration of justice in any Court of this State.

An indictment charging a conspiracy unlawfully and corruptly to obstruct due administration of justice in a certain named case, in a certain named Court, is sufficient, since it states the object of the conspiracy and informs the accused of the crime with which he is charged.

An indictment may contain several counts charging the same offense in different language, so that they apparently charge different offenses.

It is within the discretion of the trial Court to refuse to allow a question to a witness, which he has once clearly answered, to be repeated over and over again.

The defendant was indicted for a conspiracy to obstruct the due administration of justice in a certain Court, and the evidence showed that he agreed to endeavor to induce a Grand Jury to dismiss a charge against a certain person for the unlawful sale of liquor. A witness who testified that he paid the defendant a sum of money may also testify that he paid it because he presumed that the case had been dismissed by the Grand Jury through the exercise of defendant's influence.

The evidence in this case examined and held to be admissible to prove a conspiracy between the defendant and others to obstruct the administration of justice, and that this evidence was corroborated by proof of the admissions and statements of the defendant.

In a criminal case, the Court cannot be required to instruct the jury as to the legal effect or sufficiency of the evidence, since in such a case the jury are judges of the law.

Decided January 11th, 1910.

Appeal from the Criminal Court of Baltimore (GORTER, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE and THOMAS, JJ.

Thomas G. Hayes, for the appellant.

Albert S. J. Owens, State's Attorney for Baltimore City, and *Eugene O'Dunne*, Deputy State's Attorney (with whom was *Isaac Lobe Straus*, Attorney-General, on the brief), for the appellee.

THOMAS, J., delivered the opinion of the Court.

The appellant was indicted in the Criminal Court of Baltimore City for unlawfully conspiring with one W. Wallace Elliott and a certain other person to the grand jurors unknown to unlawfully obstruct the due administration of justice in said Court.

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The defendant demurred to the indictment and to each count thereof; the demurrer was overruled and the trial resulted in a verdict of guilty.

During the trial nine exceptions were reserved by the defendant; the first seven to the refusal of the Court to allow certain questions to be asked and answered in the cross-examination of a witness for the State; the eighth to the refusal of the Court to strike out the answer of the witness, and the ninth to the overruling of a motion by the defendant, at the conclusion of the State's testimony, to strike out all of the evidence produced by the State, "or any part thereof, which may be inadmissible."

After the verdict the defendant filed motions for a new trial and in arrest of judgment. These motions were overruled by the Supreme Bench of Baltimore City, and the defendant was sentenced to pay a fine of \$200 and costs, from which judgment he has appealed.

1. The indictment contains sixteen counts. The demurrer to the first, second, seventh and eighth counts was not pressed in this Court, but it is insisted that the other counts are defective because they fail to give to the defendant any definite or certain information of the crime with which he is charged; and because they "are vague and uncertain, and in each of them the object of the conspiracy is set out as a conclusion of law."

The first and seventh counts charge as the object of the conspiracy "unlawfully and corruptly to endeavor to influence the jurors of the Grand Jury aforesaid of the September term of the said Court for the said year nineteen hundred and eight, in the discharge of their duty as such jurors as aforesaid, so as to cause said charge against the said Marcyz Plasynski to be dismissed by said Grand Jury for the September term of said Court."

The second and eighth counts state that the conspiracy was "unlawfully and corruptly to endeavor to impede the jurors of the grand jury aforesaid—in the discharge of their duty

as such jurors as aforesaid, so as to cause said charge against the said Marcyz Plasynski to be dismissed," etc.

In the other counts the object of the conspiracy is charged as follows:

3rd, 9th and 13th. "Unlawfully and corruptly to obstruct the due administration of justice in said Court in said cause therein and then pending as aforesaid."

4th, 10th and 14th. "Unlawfully and corruptly to impede the due administration of justice in said Court in said cause therein then pending as aforesaid."

5th, 11th and 15th. "Unlawfully and corruptly to endeavor to obstruct the due administration of justice in said Court in said cause therein then pending as aforesaid."

6th, 12th and 16th. "Unlawfully and corruptly to endeavor to impede the due administration of justice in said Court in said cause therein then pending as aforesaid."

The nature of the crime with which the appellant is charged, as well as the requisites of good pleading in such cases, have been so recently and fully considered and stated by this Court, as to require and admit of but little further discussion. It is well established by the decisions in this State, and by the great weight of authority elsewhere, that the gist of the common law offense of conspiracy is the unlawful combination and agreement. The agreement may be to commit a crime or to accomplish an unlawful purpose or to do a lawful act by a criminal or unlawful means, but in neither case is an overt act necessary to the completion of the offense. Where the object of the combination is to commit a crime or to do an unlawful act, the means by which it is to be accomplished are immaterial, the offense being the *unlawful agreement* to accomplish the criminal or unlawful purpose.

In an indictment charging the common law offense, the means by which an unlawful or criminal object is to be accomplished need not be stated, and in stating the object it is only necessary for the indictment to show that the purpose of the conspiracy is criminal or unlawful. When the agreement

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is to commit an offense known to the common law or created by statute,, it is not necessary, in stating the object of the conspiracy, to set out the offense with the accuracy or detail required in an indictment for that offense. The reason for the rule is that the crime of conspiracy does not consist in the accomplishment of the unlawful object, or in doing the acts by *means* of which the desired end is to be attained, but the *essence* of the offense is, as we have stated, the *unlawful combination and agreement* for *any* purpose that is unlawful or criminal. This rule does not, of course, apply to conspiracies to do a lawful act by unlawful means. In such cases it must appear by the indictment that the means to be employed are unlawful.

In *State v. Buchanan et al.*, 5 G. & J. 317, JUDGE BUCHANAN states that at common law a conspiracy to do anything that the law forbids is indictable, and that "the case of the *King v. Marbry and others*, 6 T. R. 619, was a conspiracy to pervert the course of justice, which is of itself an indictable offense." The same learned judge, after a most careful review of the decisions in England "running through a space of more than four hundred years," says that it is clearly settled "that in a prosecution for a conspiracy, it is sufficient to state in the indictment, the conspiracy and the object of it; and that the means by which it was intended to be accomplished need not be set out, being only matters of evidence to prove the charge, and not the crime itself, and may be perfectly indifferent."

In the case of *Blum v. State*, 94 Md. 375, the appellants were indicted in the Criminal Court of Baltimore City "for conspiracy 'by means of divers false pretenses and representations, and other false and subtle means and devices to obtain and acquire unto themselves certain properties, moneys, goods and chattels' of certain corporations and persons named in the indictment, and of certain other persons to the jurors unknown, of the value of \$2,500.00, and to cheat and defraud such persons and corporations." JUDGE PEARCE, after stating that a "large part of the able brief of the ap-

pellants, and of the oral argument of their distinguished senior counsel (the late Wm. Pinkney Whyte), was devoted to a criticism of the indictment, which it is contended does not set forth the offense with the clearness and certainty necessary to apprise the accused of the crime with which they stood charged," said "no demurrer having been interposed to the indictment, we would not be warranted in reviewing it here, but we deem it proper to say in order to avoid the creation of any doubt upon the question, that we regard the sufficiency of the indictment as established by the decision in *State v. Buchanan*,—where all the authorities are elaborately reviewed. No decisions in this State are more highly regarded than those rendered by CHIEF JUSTICE BUCHANAN, and we think his opinion in that case is sustained by the weight of authority. In 6 *Am. and Eng. Ency. of Law*, 2nd edition, note page 587, it is said that the law there laid down has been doubted in a few isolated instances, but that it has not been successfully assailed. It was denied in *State v. Rickey*, 9 N. J. L. 293, but this view was disapproved by CHIEF JUSTICE GREEN in *State v. Norton*, 23 N. J. L. 44, and by CHIEF JUSTICE BEASLEY in *State v. Donaldson*, 32 N. J. L. 151; the former saying that the great weight of authority, the adjudged cases no less than the most approved elementary writers, sustained the law declared in *State v. Buchanan*, and the same view is held by the Courts of Connecticut, Illinois, New York, Pennsylvania and North Carolina. The case of *U. S. v. Cruikshank*, 92 U. S. 542, is not, in our opinion, in conflict with this view, the prosecution there being under the statute of the United States known as the Enforcement Act, and the indictment failing to specify in any of the counts what right or privilege granted or secured by the Constitution or laws of the United States, the traversers had conspired to defeat."

In the very recent case of *Lanasa v. State*, 109 Md. 602, the object of the conspiracy charged in the third count was "to willfully and maliciously injure and destroy the property of Joseph Di Georgio," and counsel for the appellant in that

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case insisted, as is contended by the distinguished counsel for the appellant in this case, that the object of the conspiracy was not sufficiently described, but this Court, in the opinion delivered by JUDGE BURKE, said: "Upon the settled law of this State and upon the authority of well reasoned cases in other jurisdictions, we cannot agree that the count assailed is in any respect defective, or that the judgment should be arrested. A conspiracy may be described in general terms, as a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose; or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means. It is not essential that the act intended to be done should be punishable by indictment. The *essence* of the offense consists in the *unlawful agreement* and combination of the parties, and therefore is completed whenever such combination is formed, although no act is done towards carrying the main design into effect. * * * We cannot for a moment doubt that a combination and agreement between two or more persons willfully and maliciously to injure and destroy the property of the third person is a completed criminal conspiracy, and is the subject of an indictment. Nor is it necessary to the completion of the crime that the conspirators should determine in advance what particular property should be injured or destroyed. To hold that the law cannot interpose and arrest by criminal procedure the malicious purposes of the conspirators, unless they had agreed upon the destruction of some particular property would strip it of its most beneficent preventive powers and leave the confederates at liberty to consummate their wicked purposes. The law is not so impotent and ineffective. As it is not essential to the completion of the offense that any particular property should be destroyed, it is, therefore, not required that the object of the unexecuted conspiracy should be set out with great particularity or certainty in the indictment, only such facts need be stated as shall fairly and reasonably inform the accused of the offense with which he is charged. To require more in such a case would be to put an

unnecessary burden upon the State, and make it impossible in many cases to secure the conviction of the guilty."

In the case of *Commonwealth v. Eastman and Others*, 1 Cushing, 224, the Court held that: "If the alleged conspiracy be an unlawful agreement of two or more persons to do a criminal act which is a well-known and recognized offense at common law, so that by reference to it as such, and describing it by the term by which it is familiarly known, the nature of the offense is clearly indicated, in such a case a charge of conspiracy to commit the offense, describing it in general terms, will be proper."

In 8 Cyc. 664, it is said: "In charging the intended offense, the indictment need only be certain to a common intent. The crime intended to be accomplished by the conspiracy need not be described in the indictment with the accuracy or detail which would be essential to an indictment for the commission of the offense itself, but need only be designated as it is known to the common law or defined by statute. Allegations of acts which if committed would have constituted the crime are not required; but where the intended offense has no designation at common law, or having a designation the indictment does not so refer to it, but attempts to state its ingredients, they must be stated as fully as if the indictment were for the commission of the offense itself. If the purpose of the conspiracy be the doing of an act which is not an offense at common law, but only by statute, such purpose must be set forth in such a manner as to show that it is within the terms of the statute."

It cannot be doubted that it is an indictable offense at common law to obstruct the due administration of justice, and sec. 28, Art. 27 of the Code, provides for the punishment of any person who shall corruptly "obstruct or impede, or endeavor to obstruct or impede, the due administration of justice," in any Court of the State. The indictment here is not for obstructing the due administration of justice, but for a conspiracy having for its object an unlawful and criminal purpose. If an indictment charging a conspiracy to obtain

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certain properties of certain persons "by means of divers false pretenses and representations, and other false and subtle means and devices," and an indictment charging a conspiracy to "willfully and maliciously injure and destroy the property" of a certain person, without naming the property; or the means by which it was to be destroyed, sufficiently informed the accused of the crime with which they were charged, an indictment charging a conspiracy to unlawfully and corruptly obstruct the due administration of justice in a certain case in a certain Court, is not less certain and definite.

In view of the decisions to which we have referred, and the great number of authorities cited in support of them, we cannot hold that the indictment in this case fails to sufficiently state the object of the conspiracy, or to inform the accused of the crime with which he is charged.

It is true there are many means by which the due administration of justice may be unlawfully and corruptly obstructed, resort to which would be an indictable offense, coming within the general designation; but the unlawful agreement may not have gone to the extent of determining which of these means was to be employed in the accomplishment of its object, and such determination was not essential to the completion of the conspiracy.

2. In support of the motion in arrest of judgment, it is urged that the counts in the indictment charge *apparently* the same offense, and that the indictment is, therefore, bad for duplicity. It is conceded that an indictment may contain several counts charging the same offense, but it is claimed that they should, nevertheless, *apparently* charge different offenses. Without referring to the authorities cited in support of this contention, it is only necessary to say that the several counts in the indictment in this case are not exactly alike, and we think that there is sufficient variation to obviate so technical an objection.

3. Marcyz Plaszyński kept a saloon on his premises, No. 1625 Eastern avenue, Baltimore City. On Sunday, the 13th

of December, 1908, his place was raided, and on the same day he was arrested and charged before the appellant, one of the Police Justices of Baltimore City, with selling intoxicating liquor on Sunday, and was committed for the action of the Grand Jury. This charge was pending before and was dismissed by the Grand Jury on the 15th of December, 1908. W. Wallace Elliott, the co-conspirator, was called by the State and testified that he was employed as solicitor by the George Brehm Brewing Company, and that his duties were to attend to all outside business of the company and to solicit new business; that he knew Marcyz Plaszyński, and that he was a customer of the brewery company. When asked to tell all he knew in regard to meeting Justice Garland, the appellant, on Tuesday, the 15th of December, 1908; "the circumstances surrounding it, and how it came about and what happened," he testified as follows: "I will start on the morning when I arrived at the brewery. I arrived at the brewery on that Tuesday morning—Tuesday, December 15th—at my usual hour, which is eight o'clock in the morning. The rest of the force get there a little earlier than I do. I had left the brewery office for some purpose—I don't know what—for a few minutes, and when I came back in the office I was informed that Mr. Plaszyński had been there and stated that his case would come up before the Grand Jury that day and wanted us to do what we could for him. We talked the matter over in the office, and I made the remark, I did not see what we could do for him; and Mr. Broadbelt, he replied, 'Well, why don't you see Bill Garland; perhaps he can do something?' I said, 'I don't see what he can do; he is the committing magistrate.' 'Well,' he says, 'he has friends, and you don't know what he can do.' I then said, 'Come to Mr. Brehm's private office;' and I told him that it had been suggested that I see Mr. Garland; and he says, 'Well, see him.' I then proposed to call him up over the telephone, to make an appointment to meet him uptown. I called him up over the telephone, told him who I was, and asked him if he could meet me uptown

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at the Equitable Cafe at about ten o'clock. He told me to make it a quarter of ten. He said to me he had a good deal of business to attend to; to make it a quarter of ten o'clock. I went uptown and arrived there on time, and so did Mr. Garland. He met me in the cafe in the Equitable Building. I asked him to step outside into the corridor, which he did. I then said to him, 'Judge, I called you up to have a talk with you in regard to the Plaszyński case.' He says, 'Well, what about it?' Says I, 'Mr. Plaszyński has been out to the brewery; I did not see him, but he has been out there and protesting his innocence and talking about his case, and we really think there is not a strong case against him, and don't see how you could have sent his case to Court.' He said, 'Well, I thought there was something there the Grand Jury ought to unravel, and I sent it to Court.' I then says, 'Judge, can you do anything to get this man out of trouble?' He says, 'I cannot, but I can get somebody.' Says I, 'All right, I will leave the case with you and I hope that you can do something.' He says, 'Will he pay?' I says, 'Yes, we will pay.' 'How much?' I said, 'I don't mind'—I think I said, 'I don't mind twenty or twenty-five dollars.' That is what I said, to the best of my memory. And he said, 'Will you make it forty-five dollars?' And I said, 'Yes.' He says, 'All right, I will see what I can do. All right, I will see what I can do.' And he left me with a wave of his hand. I went back into the cafe, and in a few minutes Mr. Plaszyński came in and he said, 'My case is before the Grand Jury.' I said, 'Yes; I am looking out for you, Mr. Plaszyński.' I had to halloo at him; he is very deaf and speaks English very imperfectly and understands very badly. I says, 'I am looking out for it.' He says, 'You will get me a good lawyer?' I says, 'Yes, I will.' He says, 'You get me a good lawyer, Mr. Elliott.' I says, 'It will cost you twenty-five dollars.' He says, 'All right.' He went away. I left and went attending to my business around, and don't know what became of him then; and in the afternoon—I am sure it was not earlier than half-past

twelve o'clock; it may have been 1 o'clock—I was standing at the Equitable bar, and Mr. Garland came in. He says to me, 'Mr. Elliott, that case has been dismissed.' 'That is all right, Judge,' I says, 'I will give you that money tomorrow, Judge. Will that do?' He says, 'Well, that will do, but I would rather have it today, if you can give it to me.' I says, 'All right, I will go over to the office and get it.' I went to the office and got the money out of the safe. I think I got—I got it as large as I could. There was a twenty-dollar note in it. I made it a point to get the money as large as I could. When I left him in the cafe he went back to the eating bar. He said, 'I am going back to get something to eat.' When I returned with the money I came in through the dining room in the rear, passing along the row of seats. Mr. Garland was seated there, eating lunch. The bar was filled; there was not a vacant stool in front of the bar. He sat about in the middle in the front of the bar, and his pocket was partially open. I put the money in his pocket—in his right coat pocket. I said, 'Judge, I put that in your pocket.' He said, 'All right.' I want to go along with it as straight as I can. Now Mr. Brehm came in, and was standing at the bar with a lot of friends; they were having drinks together, and I wanted to speak to him on some matter of business, and I asked him into one of those small rooms in the cafe, and we went there, sat down and began to talk. Mr. Garland in the meantime had finished his lunch, and came in the room and sat down and talked with us; and we talked there for five or ten minutes possibly. Mr. Garland went away, and I went then over in the office, in our office in the Calvert Building; and had not been there but a moment or two when Mr. Plaszynski came in, and he asked me about his case; and says I, 'Your case was dismissed.' 'Oh,' he said, 'I am so glad.' I said, 'Oh, yes; your case was dismissed.' I said, 'Have you any money with you?' He says, 'No.' I says, 'If I come down this afternoon, can I get that twenty-five dollars?' He said, 'Yes.' I said, 'All right; I will come down.' In the afternoon, possibly

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about four or half-past four o'clock, I stopped in at Plaszyński's place. He was not in. I asked his wife, and she said, 'He is not in.' I told her I had come down to collect twenty-five dollars from him; that the case had been dismissed, and she said she was very glad to hear it; said they had been in business for fifteen years, and that was the only trouble they had had. And she said, 'If I give you that money I suppose it will be all right.' I said, 'Yes; if not I will make it all right.' She gave me the money and I left her." He then produced a ticket, which is as follows: "Baltimore, Dec. 15th, 1908. Trade gift to N. Plaszyński; contribution towards settlement of Sunday violation case; twenty dollars," and signed "W. W. Elliott;" and said that he made out the ticket and dated it the 15th of December—the day the transaction took place, and the next morning, on the 16th, he handed that ticket in and got twenty dollars from the brewery; that "trade gift" is just a term that is used "for money that we furnish a party for any purpose. We might give him some money to have his bar repaired. That would be a trade gift. It is a gift in the course of trade between the brewery and that individual. That is all it is. * * * It was practically a gift to Mr. Plaszyński."

On cross-examination this witness was asked the following question:

"Mr. Elliott, in your dealings with Mr. Garland as to the services he was to render in the matter of the pending case of Plaszyński before the Grand Jury for selling liquor on Sunday at 1625 Eastern avenue, to which you have referred in your examination in chief, I ask you this: Did you ever, in your dealings with Mr. Garland as to this matter, request him, or did you ever unlawfully and corruptly conspire, confederate or agree with Mr. Garland and another person unknown, to obstruct, impede, or endeavor to obstruct and impede or influence any juror or jurors of the Grand Jury that had the case of Plaszyński under consideration?" The State objected to the question, and the Court refused to allow it to be answered.

The witness was then asked the following question: "In your dealings with William J. Garland, the defendant, in reference to the case of Nosecyz Plaszynski, pending before the Grand Jury of the State of Maryland, in and for the City of Baltimore, on December 15th, 1908, did you agree, either directly or indirectly, with Mr. William J. Garland, or with William J. Garland and another person unknown, to obstruct or impede, or endeavor to obstruct or impede or influence the said Grand Jury, or any member of it, and have it dismiss the said case of Plaszynski, which was pending before it?" to which he replied: "Well, Mr. Hayes, I have given you all the conversation I had with Mr. Garland in reference to the matter." "Q. I am entitled to have you answer the question categorically—yes or no?" and the question having been repeated, the witness replied, "I did not." Witness was then asked the following question: "Now, let me put substantially the same question—the same, except with a modification as to the administration of justice. In your dealings with William J. Garland, the defendant, in reference to the case of Nosecyz Plaszynski, pending before the Grand Jury of the State of Maryland in and for the City of Baltimore, on December 15, 1908, did you agree, either directly or indirectly, with William J. Garland or with William J. Garland and another person unknown, to obstruct or impede, or endeavor to obstruct or impede, the due administration of justice in the case of Nosecyz Plaszynski, then pending before the Grand Jury?" to which he replied, "I did not make any arrangement with him." But counsel insisted that he answer yes or no, and witness then answered, "No, sir." The witness was then asked on cross-examination six other questions which, in so far as they elicit from the witness a statement of fact, are the same as the second and third questions which were answered by the witness. The first, second, third, fourth, fifth, sixth and seventh exceptions are to the refusal of the Court to permit these questions to be answered. Even if we assume that these questions are free from objection, having gotten the benefit of the answers to the second and

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third questions, the traverser was not prejudiced by the refusal of the Court to allow the other questions to be answered, and the propriety of allowing a question that has been clearly answered to be repeated several times on cross-examination is a matter resting within the discretion of the trial Court. *Schwartz v. Yearly*, 31 Md. 276; 1 *Wigmore on Ev.*, p. 878.

On re-examination the witness was asked by counsel for the State the following question: "Mr. Elliott, what did you pay William J. Garland forty-five dollars for?" and he replied, "Well, sir, Mr. Garland informed me that the case had been dismissed by the Grand Jury, and presuming that it had been through his influence; I paid him the money," and the eighth exception is to the refusal of the Court to strike out said answer.

The counsel for the appellant insists that it was error to allow the witness to say that he presumed the case against Plaszynski had been dismissed through the influence of the accused, because it was the statement of the opinion of the witness. But it was the statement by the witness of *his reason* for paying the money to Mr. Garland. The acts and intention of the conspirators are clearly admissible, and the reason the witness paid the money to the traverser was as pertinent as the fact that he paid it, and was admissible for the purpose of reflecting upon the question as to whether there had been a previous agreement to corruptly influence the Grand Jury. Being admissible for that purpose, it cannot be excluded because it involves a statement that the witness presumed the case had been dismissed through the influence of the appellant.

Harry E. Warner, a witness produced by the State, testified that he had an interview with the appellant in January, 1909, in which the appellant told him that he "received \$45 from W. Wallace Elliott, solicitor for the George Brehm and Sons Brewery, to get Plaszynski out of a liquor case if possible. He said that Mr. Elliott came to him and represented that he was a poor, struggling saloon keeper who was trying to make an honest living and asked him if he would not do

something to get him out of his trouble, to which Mr. Garland said he replied that he could not do anything himself, but he knew a man up town who could, and they then agreed upon a price. Mr. Garland asked him if he would pay for it and he said he would, and they agreed upon a price;" that he told him that the price agreed upon was forty-five dollars. and that "he gave this money to a third party, a man uptown, that he got none of it himself and that he had nothing to do with the distribution of it." The witness further stated that he asked the appellant "in what way he expected this \$45.00 to be used, whether it would be by retaining an attorney or whether it would be in some legal way or whether there would be a distribution among the witnesses," and that he replied: "Oh, you know how these things are done," and gave witness no definite answer on that point, but said "those things are done every day, I was simply trying to help a friend out and got myself into it;" that Mr. Garland said: "That Mr. Elliott came to him and told him about this poor struggling saloon keeper and said 'can't you have it fixed up, it is in the grand jury room now,' and Mr. Garland said, 'I cannot do it myself, but I have a friend up town that can do it.'" There were a number of other witnesses who testified to statements by Mr. Garland in reference to the matter.

The defendant objected in advance to the testimony of each witness, and the record contains the following note by the stenographer: "The defendant objects to this testimony and the Court rules that it be admitted subject to exception, with the privilege to the defendant to move to strike out the whole or any part of it at the close of the State's case. This general objection to the incompetency of the evidence being limited to the objection that it is inadmissible until *prima facie* proof of the conspiracy is introduced, any other objections based on any other grounds, to be specially noted and ruled upon at the time, excepting the admissibility of uncorroborated testimony of accomplices." And at the conclusion of State's testimony the defendant filed a motion to strike out "the evidence of each of the State's witnesses in whole, or any

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part thereof which may be inadmissible." The grounds of the motion are, first, that the evidence does not prove or tend to prove that the defendant entered into the conspiracy charged in the several counts of the indictment; secondly, that the evidence of W. Wallace Elliott is not corroborated, and thirdly that the State failed to produce any testimony tending to prove the *corpus delicti*, and that the confessions or admissions of the defendant offered in evidence by the State cannot therefore, "prove or tend to prove that the defendant is guilty" of the conspiracy charged in the indictment."

We have carefully considered the very able presentation of the case by the learned counsel for the appellant, and have examined the numerous authorities cited in their elaborate briefs, but do not find in the record any grounds for a reversal of the judgment appealed from. We cannot hold that the evidence produced by the State was not admissible because it did not *tend* to prove the commission of the offense charged in the indictment. The evidence of W. Wallace Elliott was corroborated by the evidence of the admissions or statements of the appellant, and was admissible for the purpose of showing the alleged conspiracy. With the sufficiency of the evidence we have nothing to do. The jury in this State are the judges of both the law and the facts, and where there is no reversible error in the rulings of the Court, their finding must stand. *Hiss v. Weik*, 78 Md. 446; *Lanasa v. State*, *supra*.

In the case of *Bloomer v. State*, 48 Md. 521, the motion was to exclude from the jury all the evidence in the case upon which the State relied to support certain counts in the indictment, and the Court held that the motion was properly overruled because the jury are made the judges of law, as well as of fact, in the trial of criminal cases, under the Constitution of the State, and that they would be at liberty to disregard any instructions given by the Court. In the case of *Beard v. State*, 75 Md. 275, JUDGE ALVEY said: "The judge, therefore, cannot, by any instruction given in a criminal

case, bind the jury as to the definition of the crime, or as to the legal effect of the evidence before them. He can only bind and conclude the jury as to what evidence shall be considered by them, he being the exclusive judge of what facts and circumstances are admissible for consideration." In *Ridgely v. State*, 75 Md. 512, at the conclusion of the State's case the traversers requested the Court "to instruct the jury that the State has offered no evidence legally sufficient to support the indictment, and their verdict must be for the traversers." And this Court said: "No Court in this State, whatever may be the rule elsewhere, can be required by counsel or jury in criminal cases to give instructions, either upon the law of the crime or on the legal effect of the evidence." In the late case of *Dick v. State*, 107 Md. 17, JUDGE PEARCE says that "the motion to strike out the testimony of the State was in legal effect a demurrer to the evidence and an attempt to obtain an instruction from the Court to the jury to render a verdict for the defendant, and it is well settled that this cannot be done in Maryland, where the jury in criminal cases are the judges of the law, and the legal effect and legal sufficiency of the evidence, and the Court only determines the admissibility of the evidence." There were no exceptions to the rulings of the Court admitting the evidence produced by the State, but it was objected to, and was admitted subject to the right of the defendant to move to strike it out, on the ground that it was not admissible until *prima facie* evidence of the conspiracy had been produced, and to strike out the evidence of the accomplice, Elliott, on the ground that it was not corroborated. The order in which the evidence should be produced in such cases is a matter largely within the discretion of the Court (8 *Cyc.* 683; 3 *Greenleaf on Ev.*, 100, 16 ed.), and as we have said, there was evidence in the testimony of Elliott admissible for the purpose of showing a conspiracy, and it was corroborated by the evidence of the admissions and statements of the accused.

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Syllabus.

It is stated in 3 *Greenleaf on Ev.*, 101 (16 ed.), that, "The *evidence* in proof of a conspiracy will generally, from the nature of the case, be *circumstantial*. Though the common design is the essence of the charge, it is not necessary to prove that the defendants came together and actually agreed in terms to have that design, and to pursue it by common means. If it be proved that the defendants pursued by their acts the same object, often by the same means, one performing one part and another another part of the same so as to complete it, with a view to the attainment of that same object, the jury will be justified in the conclusion, that they were engaged in a conspiracy to effect that object."

Finding no error in the rulings of the Court below we must affirm its judgment.

Judgment affirmed.

ABRAHAM C. STRITE, GUARDIAN, vs. CLYDE
FURST, EXECUTOR.

When Guardian Entitled to Possession of Legacy Given as Remainder to Infant.

A testatrix bequeathed one-half of her estate to be held by a trustee, the income therefrom to be paid to her son for life, and after his death to his widow, and after her death the property to be divided equally between the children of the son, "each child to receive its share upon its arrival at the age of twenty-one years." The testator's son died, and then his widow, leaving an infant child. *Held*, that the guardian of the infant is now entitled to receive the property from the trustee under the will.

Decided January 12th, 1910.

Appeal from the Circuit Court for Washington County (KEEDY, J.).

The cause was argued before BOYD, C. J., PEARCE, SCHMUCKER, BURKE, THOMAS and PATTISON, JJ.

A. C. Strite (with whom were *Wagaman & Wagaman* on the brief), for the appellant.

C. A. Little, for the appellee, submitted the cause on his brief.

PEARCE, J., delivered the opinion of the Court.

This appeal involves the construction of the will of Catherine B. Bowman of Washington County, Md., and arises upon a bill filed for that purpose in the Circuit Court for Washington County by Abraham C. Strite, guardian of Walter E. Bowman. It is only necessary to consider the fifth clause of said will—which is as follows:

Fifth.—"I hereby give, devise and bequeath to my executor hereinafter named the one-half of the said residue of my estate, to hold the same in trust, and to invest the same and to pay the interest accruing therefrom annually, to my son George Walter Bowman, for and during his life, and after his death the said interest arising therefrom annually is to be paid to the wife of the said George Walter Bowman, should she be still living, for and during her life should she remain the widow of the said George Walter Bowman or if she marries again until she so marries and after the death of the said George Walter Bowman and after the death or marriage of the said wife of the said George Walter Bowman then the said one-half of the said residue is to be divided equally among the children of the said George Walter Bowman, if any, each child to receive its share upon its arrival at the age of twenty-one years. And in the event of the said George Walter Bowman leaving no children then after his death and after the death or marriage of his widow, as afore-

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said, the said one-half of the said residue is to go to my grandson Clyde Furst, for and during his life, and after his death to his wife for her life, or for so long a time as she remains his widow, and after the death of the said Clyde Furst, and after the death or marriage of his said widow, then to the children of the said Clyde Furst, if any, to be divided among them share and share alike, each child to receive its portion upon its arrival at the age of twenty-one years, but if neither my said son or grandson leave any children then after the death of my said son or grandson and after the death or marriage of their wives, the said one-half of the said residue is to be given to my nephew, Adam Elliott of Greencastle in the State of Pennsylvania."

The Court below did assume jurisdiction of the trust (see Decree, Record, page 22), and by said decree appointed Charles A. Little, Esq., trustee to receive the trust fund.

The testatrix died June 10th, 1902. Her executor Clyde B. Furst as directed by the fourth clause of the will, after the passage of a first administration account, invested all the residue of his testatrix's estate for the period of five years from her death, the period fixed by her for its distribution under her will, and on August 30th, 1907, passed a second account, showing the sum of \$6,084.54 for distribution, in which account the sum of \$3,042.27 was distributed as follows: "To this executor one-half of \$6,084.54, viz, \$3,042.27 to hold in trust and invest the same and pay the interest accruing therefrom annually to the wife of G. Walter Bowman (he being dead), so long as she remains the widow of said George Walter Bowman, deceased;" and in which account a like sum of \$3,042.27 was distributed: "To this executor to hold in trust and invest the same and pay the interest accruing therefrom annually to Clyde Furst, grandson of testatrix, for and during his life."

In addition to the above facts, the bill alleged that George Walter Bowman, son of the testatrix, died March 4th, 1903, leaving surviving him, his wife Lettie E. Bowman, and an only child, a son, Walter E. Bowman, that Lettie E. Bow-

man never remarried after the death of her said husband and died May 6th, 1908, leaving surviving her the said Walter E. Bowman the only child of her said husband, then eight years of age; that Abraham C. Strite was the duly appointed and qualified guardian of Walter E. Bowman, and as such was now entitled to receive from the trustee under the will of Catherine B. Bowman, the one-half of the residue of her said estate, the time for the division of said estate having arrived and the trust having terminated under the provisions of the fifth clause of said will. The bill then prayed:

1st. That the Court would assume jurisdiction of said trust.

2nd. That the Court would advise and direct the orator and the trustee as to the true construction of the will and especially the fifth clause.

3rd. And for such other relief as the case should require—and prayed for subpoena against Clyde Furst, executor and trustee.

The executor and trustee answered admitting all the allegations of fact in the bill, but neither admitting nor denying the claim of the guardian to the one-half of the residue of said estate, and submitted to such decree as the Court should think proper.

The Court thereupon passed a decree appointing Charles A. Little, trustee, to receive said fund from Clyde B. Furst, trustee under said will, "to the end that the said trust may be administered by him, as such trustee under the jurisdiction of this Court," with the usual requirements as to bond, etc., and this appeal is from that decree.

The learned judge of the Circuit Court filed a careful opinion from which we extract the following passages which clearly show the conclusions reached by him.

(1) "The said George Walter Bowman and his wife, Lettie E. Bowman, both being dead, and as there are no active duties now to be performed by the said trustee, as there were during the lives of the said Bowman and his wife, during which time the said trustee was to invest the trust fund and

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to pay the interest accruing therefrom annually, first, to the said George Walter Bowman during his life, and after his death to his wife, if then living, during her life or widowhood, *the trust ceased upon the death of the life tenants.*" * * *

(2) "It will thus be seen that in the events as they happened, the said trustee has no active duties to perform. Walter E. Bowman, the son of said George Walter Bowman, *takes the absolute vested interest in said fund*, not simply an interest for life with remainder over to another or others, the right to receive the same however, being delayed until he reaches the age of twenty-one years. In the event of his death before reaching the age of twenty-one years, it would vest in his personal representatives to be distributed under the laws of descent of the State of Maryland." * * *

(3) "Said fund is now held by said Clyde B. Furst, not in his capacity of executor, but as trustee." * * *

(4) "That a decree should be passed assuming jurisdiction over said trust fund." * * *

The Court below however further said: "If Walter E. Bowman were now an adult, he would be entitled to receive said fund into his possession; but under the terms of the will (being still an infant) he has no such right, and in order that the terms of the will may be complied with as to the time of payment, it is necessary for the Court to appoint a trustee to receive said fund from said Clyde B. Furst, trustee under said will, and to hold and invest the same until such time as the said Walter E. Bowman, under the will, is entitled to receive the same into his own hands. The guardian of the said Walter E. Bowman is not entitled to receive said fund, for the reason that a guardian although occupying the position of a fiduciary, somewhat analogous to a trustee, is the creature of the Orphans' Court, and as the will and all parties concerned as well as the fund involved are now before a Court of equity, such Court will assume jurisdiction over said fund and appoint a trustee to receive and hold the same *until such time as said trust may terminate.*"

This conclusion we think is in conflict with the previous conclusions of the Court. The Court had previously said: "*There is no provision in the will that the said Clyde Furst as trustee shall hold the fund to and for the children or child of the said George Walter Bowman until reaching the age of twenty-one years; on the contrary; it says that the fund shall be divided at the death or marriage of the widow of the said George Walter Bowman equally among his children.* So far as his powers as trustee under the will are concerned, they ended at the death of the widow of the said George Walter Bowman the law of course imposing upon him the duty to pay the fund to such person as may be determined to receive the same." By the decree appealed from in this case the Court has either *continued* a trust which it had just declared "had ceased upon the death of the life tenants," or it has *created* by its decree *another* trust which it has said was not created or declared by the will, and has vested in the trustee appointed by its decree, a portion of the *absolute* estate which it had just declared to be vested in Walter E. Bowman. A trustee cannot hold a legal title to an estate or fund the *absolute title* to which is vested in another. But a guardian, without acquiring any estate in the property of his ward, is the custodian of the property or estate of his ward. Section 149 of Article 93 of the Code provides that a guardian appointed by the Orphans' Court, or by a will, shall be entitled to the possession "of all the property of the infant within this State, or which may be obtained by such guardian out of the State by virtue of such guardianship or appointment."

The Circuit Court based its decision upon the supplemental opinion in *Graham v. Whitridge*, 99 Md. 294, in which JUDGE McSHERY used the following language: "With respect to that portion of the estates in remainder in which the life tenants are only entitled to a life interest, that is to say that portion which after the termination of the life estates belongs to Mrs. Whitridge and to Alexander Brown, and in which the life tenants have no vested interests in remainder, the trustees under the will of George Brown have no active

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duties to perform, and therefore for the reasons hereinbefore assigned, the trust has ceased. This being so, the parties entitled in remainder to this portion of the residue may go into a Court of equity and procure the appointment of a trustee to take possession of the fund *for its preservation* and to pay over the income arising out of it to the parties entitled to the life estates therein. *By that proceeding the life tenants will be secured their income therefrom, and the remaindermen will be protected against loss of the principal."*

But in the case at bar, there is no remainderman, or other party in any way interested in this fund, for whose protection the intervention of a trustee, can be invoked in equity, and that case can have no application to the present case.

In *Savin v. Webb*, 96 Md. 507, JUDGE SCHMUCKER said: "The authorities agree that where a vested legacy not charged upon land, is given to a child to be paid at his majority, and interest thereon is payable in the meantime, if the legatee die under age, his representative will be entitled to immediate payment of the legacy, but if no interest be payable on the legacy the representative must wait until the legatee would have come of age if he had lived," and the lower Court cited that case in its opinion. In the case now before us the whole *residue* of the estate is equally divided between the two legatees, and the one-half of the residue bequeathed to Walter E. Bowman necessarily carries the interest on that half—otherwise the residue could not be equally divided, and if the interest on that one-half in event of his death could not be paid to his representative, it would necessarily be paid to Clyde Furst, or in event of his death to his representative, who would thus receive the interest on the whole residue instead of on his half only. If this legacy is paid to his guardian, the accruing interest will come into the guardian's hands, and will be applicable for the infant's maintenance and support under the direction of the Orphans' Court and we can discover nothing in the will which indicates the testatrix intended to withhold the income from his maintenance during his minority, though the possession and control of the

principal was deferred by the will precisely as it would have been deferred by the law if the will had not so provided.

For the reasons stated we are of opinion that the learned judge of the Circuit Court was in error in his decree, and that the guardian of Walter E. Bowman is entitled now to receive this legacy from Clyde Furst, trustee under the will.

*Decree reversed and cause remanded that
a decree may be passed in conformity
with this opinion. The costs to be paid
out of the fund.*

EDWARD H. ROWE ET AL. vs. VIRGINIA GILLELAN
ET AL.

*Sale of Land for Division of Proceeds Among Owners Not De-
creed When it Can Be Partitioned Without Loss—*

*Decree for Partition in Kind Under Bill
Asking for Sale.*

Tenants in common of land are entitled to have partition or division of the same in kind; and it is only when the land cannot be divided without loss or injury that the Court is authorized under Code, Art. 16, sec. 129, to direct a sale of the property and division of the proceeds among the owners.

The bill in this case, filed by the owner of an undivided fourth interest in a tract of land containing about seventy-one acres against the defendants, one of whom owned two-fourths and the other one-fourth of the land, alleged that it could not be divided without loss or injury, and prayed for a sale of the property and a division of the proceeds among the parties according to their respective rights. The defendants alleged that the land could be divided not only without injury, but to the advantage of all concerned. *Held*, that the evidence shows, upon reference to the topography of the tract, that

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upon a partition each party would get an equal proportion of tillable land, woodland, hilly land, and each would have access to water, and that consequently the land should be partitioned, and not sold.

When a bill prays for a sale of land and division of the proceeds among the owners thereof, and also for general relief, if the evidence shows that the land can be divided without loss or injury, the Court may decree that a partition be made under the prayer for general relief.

Decided January 13th, 1916.

Appeal from the Circuit Court for Frederick County (MOTTER, J.).

The cause was argued before BOYD, C. J., BRISCOE. PEARCE, SCHMUCKER, BURKE, THOMAS and PATTISON, JJ.

Milton G. Urner and Milton G. Urner, Jr., for the appellant.

Frank L. Stoner and Vincent Sebold (with whom was Leo Weinberg on the brief), for the appellee.

BURKE, J., delivered the opinion of the Court.

This is an appeal from a decree of the Circuit Court for Frederick County, under which certain real estate was directed to be sold for purposes of partition. The bill was filed by H. Morris Gillelan, a son of David S. Gillelan, who died intestate on the 7th day of November, 1904, leaving surviving him a widow, Virginia Gillelan, and four adult children, his only heirs at law. His children are H. Morris Gillelan, the complainant, and Anna, Charles and William Gillelan. At the time of his death he was seized of a tract of land in Frederick County containing about seventy-one acres, and upon his death the title to this land vested in his heirs at law, subject to the dower of his widow. Twenty-two and one-half acres of this land were sold prior to the institution of

this suit. Before the suit was brought Virginia Gillelan, Anna B. Gillelan, and William R. Gillelan by deed dated December 30th, 1907, granted and conveyed all their interest in the land in question to Edward H. Rowe. The evidence shows that he paid one hundred and seventy dollars each to the two children for their undivided interest, and one hundred and seventy-five dollars to Mrs. Gillelan for her dower interest in the whole tract, so that at the time of the institution of the suit Rowe was the owner of two undivided fourth interests, and the other two fourths were owned by the plaintiff and Charles Gillelan, one of the defendants. The prayers of the bill are:

- (1) That a decree may be passed for the sale of the property.
- (2) That the proceeds of the sale may be divided among the parties in interest according to their respective rights.
- (3) And for such other and further relief as the case may require.

The ground upon which the sale of the property is asked is, as alleged in the fourth paragraph of the bill, that it "is not susceptible, or capable of division or partition without great and irreparable loss and injury to the parties." The answer of the respondents, who comprise all the persons interested in the property, except the complainant, denies the allegations of the fourth paragraph of the bill, and avers "that the real estate mentioned is susceptible and capable of division or partition among the parties thereto entitled without loss or injury to said parties, and they aver that the said real estate consists of an unimproved tract of land containing 48 acres, 2 roods and 10 perches, more or less, and is so situated with reference to public roads and adjacent properties as to be divisible among the parties thereto entitled, not only without loss or injury, but with an actual increase in its value."

The lower Court was of opinion that the allegations of the fourth paragraph of the bill had been proved, and, therefore, directed a sale of the property. With this conclusion we are

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unable to agree. We think the evidence is not of such a character as to authorize the Court, against the protests of the owners of three-fourths of the property, to sell it. They had a right to have a division in kind, if that division could be had without loss or injury to the parties in interest, and it is only where the evidence shows that it cannot be divided without loss or injury that the Court is authorized to direct a sale under *Section 129 Article 16 of the Code 1904*. In *Thurston v. Mincke*, 32 Md. 576, JUDGE ALVEY stated the rule which should be applied in cases of this kind: "If it be alleged and proved that the estate cannot be divided without loss or injury to the parties interested, the Court is clothed with power, by the statute, to decree a sale, and a division of the money arising therefrom among the parties, according to their respective rights. This statute provision is a modification of the previous law on the subject, and was intended to promote the interest of the parties concerned. It is, however, to be construed with reference to the pre-existing law, and if it is not made to appear that the estate cannot be divided without loss or injury to the parties interested, it must be partitioned in the ordinary way. Partition is a matter of right, and the only modification of it with us is, that the estate may be sold instead of being partitioned in kind, if it be shown that the latter course cannot be pursued without loss or injury to the parties interested."

In our opinion, the evidence fails to support the jurisdictional averment made by the bill, viz, that this property cannot be divided without loss or injury. The burden was upon the plaintiff to make out a case within the rule stated. The evidence is conflicting upon the essential question involved; but the weight of the evidence is in favor of the contention of the respondents stated in their answer.

The property is located about one and a quarter miles from Emmitsburg, and is bounded on the south and west by two public roads and on the east by Middle Creek. On the east about two and a half acres are hilly, and about six acres are in wood, and the balance of the land, about forty acres is

available for cultivation and pasture. Twenty and a half acres of this have been fenced off and cultivated, and the balance is good pasture land, and has been used for that purpose for a number of years,—the cattle having the benefit of shade, and water from Middle Creek.

About fifteen years ago an exchange was made between David S. Gillelan and John Krump by which some land at the upper corner of the tract along the creek was exchanged for a watering place for stock at the southeast corner along the Littletown road. The whole of the tract upon the east, except a small portion, touches upon Middle Creek, and waters of the creek, in varying width, are included within the lines of the property.

It is not disputed that this tract is capable of partition; but it is contended that a division would shut off access to water, except as to one lot, and the whole of the plaintiff's case rests largely, if not almost entirely, upon this assumption. This is evident from the testimony of all the plaintiff's witnesses. Mr. Patterson said that if the property were divided "one man would get timber, one would get water, and one would get a field in the hot sun." Mr. Ohler said there was only one watering place on the tract; and he also said that if the land "were divided and fence put up it would be worth much more." Mr. Harbaugh's reasons for his opinion that the land could not be divided without loss or injury were that (1) "some of this land is worth five dollars, and some fifteen dollars, and some twenty-five dollars per acre, that is the reason, because the land isn't all alike." (2) Because "there is only one place to water, that is on the eastern corner below the dam on Middle Creek." Mr. Annan said it could not be divided because each lot would not have access to water, and the complainant testified that the big objection to the division would be the water.

It is apparent that all these witnesses, and they are all that the complainant produced to support his case, had in mind the division of the tract upon lines run from the Littletown road north. If that were the only way to make the

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partition we would readily adopt their view and say that the division could not be made without loss; but upon the record before us these objections have no force if the lines are run east from the public road on the west to Middle Creek on the east. That would be a practicable way to make the division and would not upon the evidence before us result in loss to any of the parties. By this method, as stated by one of the witnesses, "each party would get an equal proportion of tillable land, wood land, hilly land, and each will have water, each strip being about equal in size, equal in quality and equal in value." The situation and topography of the tract, and the testimony offered in behalf of the respondents, satisfy us that the property can be divided without loss or injury, and that the reasons given against the position of the defendants are based upon an impracticable method of partition. The cost of fencing, after the division, has, we think, been much magnified. Assuming that two adjacent lots were allotted to Mr. Rowe, the owner of one-half, as would probably be done, it would only require two additional fences, and for all necessary purposes these fences would not be very expensive and these, as stated by Mr. Ohler and Mr. Adams, would increase the value of the land.

Under the bill the complainant was entitled to a partition, or sale according to the evidence, and under the prayer for general relief a partition may be had. For this reason, the bill will not be dismissed, but the cause will be remanded that a commission may be issued to make the division. This was settled in *Campbell v. Lowe*, 9 Md. 500, where the Court said: "Suppose that in this case proof had been taken, and the Court had been satisfied that the interest of the parties did not require a sale, would there have been any reason or justice in dismissing the bill, and subjecting the parties to the cost of another proceeding, for partition in the ordinary way, on the assumption that such relief would be inconsistent with the object of the bill? Why not, in such a case, if the Court was satisfied of the complainant's right to partition, allow him the benefit of his proceeding, by ordering a com-

mission for that purpose? The error in the argument of the appellee's counsel is this, that it treats this bill as seeking to obtain one of two inconsistent alternative objects, whereas the design of this proceeding is to obtain partition of this common property, in one of two modes allowed by the law, according to the situation of the property, and the circumstances of the case. It is within the doctrine applicable to the uses of the general prayer. In *Tomlinson v. McKaig*, 5 Gill, 256, a bill was filed under the act to direct the descents, in which it was averred that the land would not admit of an advantageous division, and sale was prayed. There was also a prayer for general relief, and such other proceedings as might be necessary. The Court held, that "the complainants were entitled, under the frame of the bill and the prayers, to such action of the Court as the case made in the bill would by law entitle them to; and that it was not material to the case that the bill assumed that the land was incapable of division, and that there was a specific prayer for the appointment of a trustee to sell the land; that the one might have been an inappropriate averment, and the other an inappropriate prayer, for such a case; but they would not vitiate averments conferring jurisdiction, or affect a prayer for general relief, which always justifies the ultimate action of the Court thereupon, in pursuance of the case made by the bill." In this case the appellant states his title, that the property will not admit of partition that a sale would be advantageous to both parties; that the defendant refuses to divide the property, or unite in making a sale. The averment that the lot did not admit of partition, may have been inappropriate, in view of the statement that the defendant had refused to divide the property; but as in the case cited, such a statement ought not to vitiate the case made by the bill, or affect the complainant's right to be relieved by partition under the general prayer."

Being of opinion that the lower Court had no jurisdiction upon the evidence to order a sale of the property, the decree

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will be reversed and the cause remanded, with leave to the parties to take such further proceedings as the purposes of justice may require.

Decree reversed with costs, and cause remanded.

WILLIAM E. HODEL vs. STATE OF MARYLAND.

Construction of Statute Relating to Sheriff of Allegany County—Indictment for Perjury in Making Report of Expenditures—Evidence—Different Penalties for Violation of Different Parts of Statute.

The Act of 1904, Chap. 213, relating to Allegany County, provides that the County Commissioners shall allow to the sheriff the actual sum of money expended by him in purchasing food and essential clothing for the prisoners in jail, but that no allowance for expenditures should be paid or credited to the sheriff unless the same be reported under oath by him, which oath shall show that the expenditures were lawfully incurred, and that the sheriff himself has not derived any profit therefrom, or consumed or appropriated to himself any part of such purchases. The Act provided that all false swearing in such report and affidavit shall be deemed perjury and be punishable as such. Upon an indictment for perjury against a sheriff under this statute, the evidence showed that the sheriff reported that he had expended certain money in purchasing designated kinds of food for the prisoners in jail, and made affidavit that the report was correct, and that he had not himself derived any profit from the purchases or consumed or appropriated to himself any part thereof; also evidence that some of the articles so purchased were not for the use of the prisoners in jail. *Held*, that although the accounts of the persons supplying these articles were made out against the County Commissioners and payment was made

therefor by them, and not by the sheriff himself, yet such payment was made upon the report and affidavit of the sheriff, and was in effect the same as if the allowance had been made to him for an expenditure, and evidence of his report and affidavit, and of the falsity thereof is admissible under the indictment.

The Act of 1904, Chap. 213, provides, among other things, that all false swearing in the report of the Sheriff of Allegany County as to expenditures made by him shall be deemed perjury and punishable as such. The Act also provides that any violation of its requirements shall constitute a misdemeanor and be punishable upon conviction by forfeiture of office, or fine, or imprisonment, or by all three, in the discretion of the Court. *Held*, that these provisions as to punishment for violation of the Act are not repugnant, and that the sheriff, found guilty of making a false report as to expenditures, is liable to the punishment prescribed for perjury.

Decided January 12th, 1910.

Appeal from the Circuit Court for Allegany County (BOYD, C. J., and KEEDY, J.).

The cause was argued before BRISCOE, PEARCE, SCHMUCKER, BURKE and THOMAS, JJ.

Ferdinand Williams and *J. Philip Roman* (with whom was *De Warren H. Reynolds* on the brief), for the appellant.

Isaac Lobe Straus, Attorney-General, for the appellee.

BRISCOE, J., delivered the opinion of the Court.

The traverser was indicated for perjury, in the Circuit Court for Allegany County, on the 28th of April, 1909, for violation of the provisions of the Act of 1904, Chapter 213, an Act to repeal and re-enact with amendments section 227 of Article 1 of the Code of Public Local Laws, entitled "Allegany County," sub-title "Sheriff," as enacted by the Acts of 1902, Chapter 202.

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To the indictment he pleaded not guilty, and upon the first trial, the jury disagreed, and was discharged.

Upon a second trial, he was found guilty by a jury and on the 26th of June, 1909, was sentenced by the Court to confinement in the Maryland Penitentiary for the period of one year. And from the judgment so entered against him this appeal has been taken.

It appears from the docket entries in the case that the plea of not guilty was withdrawn at the second trial, and a demurrer was interposed to the indictment, and that the demurrer was overruled. The record in the case does not contain the demurrer but as it has been argued at the hearing as if regularly in the case, we shall consider it as if it was properly before the Court.

In the course of the trial the traverser reserved a single exception to the ruling of the Court upon the admissibility of evidence and that was to the action of the Court in overruling the traverser's objection to the introduction in evidence of the report, account and vouchers of the traverser, as sheriff of Allegany County, for the month of November, 1908, to the County Commissioners of Allegany County. And this constitutes the first and only exception presented by the record.

The Act of 1904, Chapter 213, upon which the indictment is based, provides in part, that the County Commissioners of Allegany County shall allow the sheriff certain enumerated expenses mentioned in the Act, and by the sixth paragraph, they shall allow the sheriff, the actual sum of money expended by him in purchasing food and essential clothing for the prisoners in jail * * *, and they shall allow and pay the sheriff, for no other or further expenses whatsoever, upon any pretext, unless the unenumerated expenses, shall have been previously and specially ordered by the board, in session. And it is specially provided by the Act, that no allowance for expenditures shall be paid or credited to the sheriff unless the same shall be reported under oath by the sheriff to the Board of Commissioners once in each month in writ-

ing, which oath shall show that the expenditures above enumerated when made are correct and have been honestly and lawfully incurred and that the sheriff himself has not derived any profit from the purchase thereof, or consumed or appropriated to himself or permitted his deputy to appropriate to himself any part of such purchases; that each expenditure or purchase was reasonable and necessary and the price thereof was not in excess of the market price thereof, which report and affidavit shall be accompanied by properly itemized vouchers or certificates showing for whom and for what purpose the same were made. All false swearing in such report and affidavit shall be deemed perjury and be punished as such. The sheriff shall also include in the monthly report a full statement of all fines and costs by him collected, and shall pay the same over to the county treasurer. Any violations of the requirements of this Act, or failure to comply therewith shall constitute a misdemeanor and be punished upon conviction, by forfeiture of office and fine or imprisonment, or by all three, in the discretion of the Court.

The indictment consists of two counts and they in substance charge, that the traverser, did on the 1st day of December, 1908, at Allegany County, before Joseph A. Gonder, a justice of the peace of the State of Maryland, in and for Allegany County, in the manner and form, as set out in the indictment falsely, corruptly, and unlawfully commit wilful and corrupt perjury.

The particular offense or the specific perjury charged in the indictment, is the false affidavit or false swearing to the sheriff's report and account submitted by the sheriff, for the month of November, 1908, to the County Commissioners of Allegany County.

The Act of 1904, *supra*, declares that "all false swearing in such report and affidavit shall be deemed perjury and be punished as such."

It appears from the record, that the report of W. E. Hodel, Sheriff of Allegany County, for the month of November, 1908, to the County Commissioners of Allegany County,

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shows, "that he has expended and craves allowance for the expenditures set out below, as follows:" For actual sum expended in purchasing food and clothing for the prisoners in jail, as per vouchers annexed, to wit:

John M. Street.....\$40.14

L. Neubiser and Son..... 64.54

This report, account and vouchers were submitted and signed by W. E. Hodel, Sheriff of Allegany County, and the following affidavit, as required by the Act of 1904, annexed thereto, in these words:

STATE OF MARYLAND, ALLEGANY COUNTY, *to wit*—

"I hereby certify that on this 1st day of Dec., 1908, before me, the subscriber, a Justice of the Peace of the State of Maryland in and for Allegany County aforesaid, personally appeared W. E. Hodel, Sheriff of Allegany County, Maryland, and made oath in due form of law that the expenditures set out in the above report are correct and have been honestly and lawfully incurred, and the said Sheriff has himself not derived any profit from the purchases thereof or consumed or appropriated to himself, or permitted his deputy to appropriate to himself, any part of said purchases; that each expenditure or purchase was reasonable and necessary, and the price thereof was not in excess of the market price therefor, and that the items, vouchers and certificates attached to the above report show correctly from whom and for what purposes the said purchases were made.

Jos. A. GONDER,
Justice of the Peace."

It further appears that the bills of Street and Neubiser as set out in the record, and as charged in the indictment, were made out entirely for loaves of bread and for beef, respectively.

The testimony, however, on the part of the State, shows that while the Street account was made out for only bread, that other articles had been delivered to the sheriff, to wit, pies, cakes, creams, buns, etc., and had been charged as bread, according to the express orders of the sheriff. The

witness Korns, the bookkeeper for Street, testified that the bill has been correctly made out, but was returned by Hodel to him, and he was instructed that it "be made out all bread, that was the way he wanted it made out." The proof as to the Neubiser bill was to the effect, that while correct in amount, beef was not the only meat delivered, but the greater part of the bill was for other meats, to wit, chicken, veal, ham, pork, etc., and that the bill was made out all beef, upon direction of the sheriff. And it is stated in the appellee's brief, "that the State proved by John Labor, that the prisoners did not receive any of the pies, cakes, lamb, veal, ham, chickens, etc., but only the beef bought from Neubiser and the bread bought from Street, and these facts were not denied by the traverser.

The indictment it will be seen, is in the usual form and accurately describes the offense, with some degree of particularity, as perjury, within and in violation of the Act of 1904, in false swearing in the report and affidavit, herein set out. The evidence is uncontradicted and clearly sustains the charge in the indictment, and the record fails to disclose any evidence tending to explain or deny the charges.

It is urged, however, that the Court below committed an error, in admitting in evidence the bill, voucher, account and affidavit, as set out in the traverser's bill of exceptions, upon the ground that the statute does not require the sheriff to make affidavit to the accounts of the merchant who sells provisions for the jail, but only requires the affidavit when he, the sheriff, is claiming an allowance from the commissioners for expenditures made by himself, therefore, the affidavit admitted by the Court was extra judicial, not required by the statute and was not perjury in law, even if it was false, but a mere voluntary affidavit.

There can be no sound objection we think to the admissibility of this evidence. By the very terms of the Act, the money expended, in purchasing food and essential clothing for the prisoners in jail, was to be allowed to the sheriff, and no allowance for such expenditures could be paid or credited

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to him, unless the same was reported under oath by the sheriff to the County Commissioners once in each month in writing, and his report and affidavit had to be accompanied by properly itemized vouchers or certificates showing for whom and for what purposes the same were made. And by the very terms of the statute, all false swearing in the report and affidavit is declared to be perjury and be punished as such. The County Commissioners would not have been authorized, except upon a report by the sheriff, as provided by the statute, to have allowed the expenditures, in purchasing food for the prisoners in jail, and these expenditures were included in his report.

The report and oath of the traverser, as sheriff of the county, formed the very basis of the charge in the indictment and their introduction as evidence was not only pertinent and material to the issue and inquiry, but were admissible as original primary evidence in the case. The bills of Street and Neubiser were set forth in the report of the sheriff "as actual sums expended in purchasing food for the prisoners in jail, as per voucher annexed." Besides this, the report made by the sheriff states, that "he has expended and craves allowance for the expenditures set out below."

The construction of the Act, here contended for, would not only sanction an evasion of the Act, but would defeat the manifest intent and purpose of the Legislature in passing it.

The ruling of the Court, in admitting this evidence, was therefore entirely correct.

We come now to consider the case as presented by the demurrer.

It is contended upon the part of the appellant that as the Act of 1904, Chapter 213, provides that all false swearing in the report and affidavit shall be deemed perjury and be punished as such, and also provides that any violation of the requirements of this Act or failure to comply therewith shall constitute a misdemeanor and be punished upon conviction by forfeiture of office and a fine or imprisonment or by all three in the discretion of the Court, the Act provides two

punishments. And as these two provisions for punishment are repugnant, the Court has no authority to impose either punishment.

The conclusive answer to this contention, is to be found in the Act itself.

The indictment and conviction in this case is for perjury under the Act. The Act itself declares that all false swearing in such report and affidavit shall be deemed perjury and be punished as such. There may be penalties prescribed against violation of the requirements of the Act or failure to comply therewith, but we are here dealing with a prosecution for false swearing in the report and affidavit, and this the statute declares shall be perjury and be punished as such. We are not here concerned with the violation of its requirements or failure to comply therewith, in other respects.

Finding no error in the rulings of the Court, the judgment will be affirmed.

Judgment affirmed.

EDWIN S. HOUCK vs. HENRY C. HOUCK AND
BELLE HOUCK.

*Decree for Sale of Property Reserving Right of Claimants to
Proceeds—Dismissal by Orphans' Court of Creditors'
Claim Against Estate—Limitations—Acknowledgment of Debt—Waiver of Statute by Ex-
ecutor—Interest on Unpaid Legacy.*

When a decree directing the sale of property is passed under an agreement which reserves to the parties the right to offer proof as to their claims against the property, the fact that the decree directs the sale to be made for the purpose of partition does not preclude a party from asserting an independent claim against the proceeds as a creditor of the deceased owner.

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The fact that the Orphans' Court dismissed the petition of a party asking that a distribution account be set aside in order that the petitioner's claim as a creditor of the estate might be paid does not prevent such party from afterwards filing a bill in equity to enforce his claim. The determination of the Orphans' Court concerning claims against the estate of a decedent is not final.

When one of the parties entitled to an interest in an estate states to another that the latter will receive every cent of the legacy bequeathed to him for which the deceased owner of the estate was liable, that is a sufficient acknowledgment of the claim to remove the bar of the Statute of Limitations, as to the party making it.

An executor has the right to waive the defense of the Statute of Limitations against a claim so far as the personal property of the decedent is concerned, but he does not have that right as against the heirs or devisees of the real estate.

A testator bequeathed the proceeds of an insurance policy to his son H. in trust for the benefit of the latter's son C., to be paid to C. upon his arrival at the age of twenty-one. The trustee H. collected the policy, mingled the proceeds with his own estate, and died leaving a will by which he gave all his property to his wife until C. reached the age of thirty, when he gave one-third of his estate to C. and the remaining two-thirds to his wife and another son. The executrix of the will, who was the wife of H., settled an account in the Orphans' Court by which she was allowed the whole balance of the estate. Some years afterwards, when C. reached the age of thirty, he filed a petition in the Orphans' Court, stating that he had never received the legacy given by the will of his grandfather, and asking that the account stated by the executrix of his father's will be set aside. The Orphans' Court dismissed this petition, and then C. filed a bill in equity asking that the property passing under the will of his father be sold for partition among the three legatees, and also that his claim as legatee under the will of his grandfather might be paid. *Held*, that C. is entitled, from the proceeds of sale, to the amount collected by H. on the policy, with interest thereon from the time of collection until he became twenty-one years of age.

Held, further, that no part of this interest from the time the estate of H. was distributed to his wife, should be charged against the share of the other son, but that the same should be deducted from the wife's share.

Held, further, that the executrix of H. is entitled to receive from the proceeds of sale the amount of certain payments made by her on account of the estate and not allowed in the distribution account.

Decided January, 12th, 1910.

Appeal from the Circuit Court No. 2 of Baltimore City (SHARP, J.).

The cause was argued before BOYD, C. J., PEARCE, SCHMUCKER, BURKE, THOMAS and PATTISON, JJ.

Robert Biggs and Frank C. Stoner, for the appellant.

Alfred J. Carr and R. D. Coe, for the appellees.

THOMAS, J., delivered the opinion of the Court.

Henry Houck, of Frederick County, Maryland, died in 1887, leaving a last will and testament by which he made the following bequest: "I give and bequeath unto my son, Henry J. Houck, in trust for the sole benefit and use of my grandchild Henry Christopher Houck, son of my said son, Henry J. Houck, all of my interest in an endowment insurance policy taken on the life of my son Henry J. Houck and assigned and transferred to me; the said policy is for the sum of \$2,500.00 and additional insurance or accumulations; the premium on said policy was paid by me from its commencement in the Mutual Life Insurance Company of New York, No. 105929; he, the said Henry Christopher Houck is not to receive the said legacy until he arrives at the age of twenty-one years which will be on the twenty-ninth day of November, in the year eighteen hundred and ninety-eight; if my decease occurs before the policy becomes due,

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in that event I request and charge my son Henry J. Houck to pay the annual premium on said policy, first by using the annual dividend declared on said policy, and the balance to be paid out of the portion of my estate hereinafter bequeathed to him."

In 1888 Henry J. Houck, the executor named in said will, settled his final account in the Orphans' Court of Frederick County, in which there was distributed to him in trust for Henry C. Houck, his son, the policy of insurance referred to in the will of Henry Houck. Henry J. Houck died in 1892 leaving a last will and testament by which he appointed his wife, Belle Houck, his executrix, and disposed of all his property as follows:

"*Item 1.*—After the payment of my just debts and funeral expenses, I give, devise and bequeath all my property and estate, real, personal and mixed, wheresoever situate or being and whether in possession, remainder or reversion unto my wife Belle Houck during her natural life or until my son Harry Houck arrives at the age of thirty years, when upon the happening of either event, I give, devise and bequeath all of my said estate to my said wife, Belle Houck, if living and my sons Harry Houck and Edwin S. Houck absolutely forever, to be divided equally between them share and share alike, a child or children of a deceased child to be entitled to the interest of my estate of his or their parent.

"*Item 2.*—Should my son Harry Houck die during the lifetime of my said wife and before he arrives at the age of thirty years without issue living at the time of his death, then I devise and bequeath all my said estate to my said wife Belle Houck and my said son Edwin S. Houck absolutely, but in case my said son Harry Houck should die during the lifetime of my said wife leaving a child or children living at the time of his death, then I direct that my said estate shall be divided into three equal parts, and I devise and bequeath one-third each to my said wife and my said son Edwin S. Houck and one-third to the child or children of my

said son, Harry Houck, living at the time of his death, absolutely."

Mrs. Belle Houck, as executrix, settled her first account in the Orphans' Court in Baltimore City in January, 1894, in which, after the payment of the costs of administration, etc., she was allowed, under the terms of the will, the whole balance of the estate consisting of leasehold property in Baltimore City, valued at \$2,000.00 and bonds and stocks to the amount of \$18,196.00. A few weeks thereafter she settled her second account in said Court, and was allowed under the provisions of the will, other bank stocks, valued at \$520.00. On January 14, 1908, Henry C. Houck, having arrived at the age of thirty years on the twenty-ninth of November, nineteen hundred and seven, filed a petition in the Orphans' Court of Baltimore City, in which, after setting out the facts stated above, he alleged that his father, Henry J. Houck, received on the third of January, eighteen hundred and ninety, from the Mutual Life Insurance Company of New York on account of said policy, the sum of \$2,977.97; that no part of said sum had ever been paid to him, and that the same, with interest thereon, was still due and owing, and praying that the accounts settled by his mother, as executrix of Henry J. Houck, be set aside and restated, etc. This petition was endorsed by Mrs. Belle Houck as follows: "I, the executrix of the estate of Henry J. Houck, admit the matters and things stated in the foregoing petition, and consent to the passage of an order as prayed." The petition was answered by Edward S. Houck, denying that the said sum of \$2,977.97 or any part thereof was due and owing, and charging that the petitioner had "been guilty of gross negligence in asserting his claim," and that the Orphans' Court had no jurisdiction in the matter. The Orphans' Court, on the 27th day of February, 1908, passed an order dismissing the petition, and on the following day, the appellees, Henry C. Houck and Ella Houck, his wife, filed their bill of complaint in the Circuit Court No. 2 of Baltimore City, against Mrs. Belle Houck and Edwin S.

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Houck and his wife, setting out the provisions of the will of his grandfather, Henry Houck, and the will of his father, Henry J. Houck, and alleging that the policy of insurance was distributed to Henry J. Houck to be held by him in trust for the appellee, Henry C. Houck; that Henry J. Houck received, on the second of January, 1890, from the insurance company \$2,977.97 on account of said policy; that said sum of \$2,977.97 has not been paid and that the same, with interest thereon, is still owing to the appellee; that at the time the defendant, Mrs. Belle Houck, executrix, etc., settled said accounts in the Orphans' Court, copies of which are filed with the bill, said appellee was only about sixteen years of age, and that he was informed, and believed that he was not entitled to receive anything from the estate of his grandfather or from the estate of his father until he was thirty years of age, and had, therefore, made no inquiry as to the facts until he arrived at the age of thirty years; that the claim of the appellee had been presented to and approved and passed by the Orphans' Court; that Henry J. Houck, at the time of his death, was possessed of certain leasehold property in Baltimore City, four \$100.00 North Carolina Bonds, two \$100.00 bonds of the City of Norfolk, 39 shares of the National Union Bank of Maryland, \$1,100.00 worth of the stock of the Unequal Perpetual Building and Loan Association of Baltimore City, 80 shares of the National Bank of Commerce, 15 shares of the National Exchange Bank, 7 shares of the German American Fire Insurance Company, \$10,000.00 in the preferred stock of the Southern R. R. Company and 13 shares of Farmers and Mechanics National Bank of Baltimore, and that he was also seized and possessed of a lot of ground in Snow Hill, Maryland; that the appellee arrived at age of thirty years on the 29th day of November, 1907; that all the debts of the said Harry J. Houck had been paid, except the debt due the appellee, Henry C. Houck, and the debt due the said Belle Houck; that the said property was not susceptible of partition without loss and injury to the parties interested, and that it would be to their advantage to

have said property sold and the proceeds of sale, after the payment of the debts due the appellee and Mrs. Belle Houck, distributed to the parties according to their respective interests. The prayer of the bill was for a decree for the sale of the property; for the payment of the amount due the appellee; for a distribution of the balance of the proceeds of sale, and for general relief.

The bill was answered by Edwin S. Houck and his wife, admitting that Henry C. Houck was only sixteen years of age when the accounts were stated by his mother, as executrix of Henry J. Houck, in the Orphans' Court; denying the claims of the appellee and Mrs. Belle Houck; averring that the Orphans' Court had no authority to approve and pass the appellee's claim, and setting up the defense of limitations and laches, but consenting to the passage of a decree for the sale of the property referred to in the bill, and reserving to the plaintiffs and defendants the right, after the passage of the decree, to offer proof "on the question of the allowance or disallowance" of the claims, and stating that the consent given to the passage of a decree for the sale of the property was "in no wise to reflect upon the validity or existence" of the claims. Mrs. Belle Houck also answered, admitting the facts alleged in the bill, and asserting her claim for \$27.00 paid a creditor of the estate, and for \$498.52 paid by her in the settlement of the accounts in the Orphans' Court. Testimony was taken; it was admitted by counsel before the examiner that Harry J. Houck received on the 2nd day of January, 1890, from the Mutual Life Insurance Company \$2,977.97 on account of the policy mentioned in the will of Henry Houck and evidence was offered tending to prove the other facts alleged in the bill, and that Edwin S. Houck, in the spring of 1905, told the appellee when speaking of the sum of money coming to him, that he should receive every cent due him, as he, Edwin S. Houck, had received a like amount in 1888. Counsel, reserving the right to offer further evidence before the auditor in support of and against the claims of the appellee and Mrs. Houck, submitted the

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case for a decree; a decree was passed for the sale of the property, the property was sold, and after a report and ratifications of the sales, the case was referred to the auditor, who filed an account, allowing the claim of Mrs. Belle Houck, to the amount of \$533.61, for over payments of administration accounts and a debt paid Wm. A. Scott, and the claim of the appellee, Henry C. Houck, to the extent of \$2,977.97 received by Henry J. Houck, January 2nd, 1890, and interest thereon to November 27th, 1898, when appellee became twenty-one years of age, amounting to \$4,568.72, and distributing the balance, after the allowance of costs, commissions and counsel fees, etc., to Mrs. Belle Houck, Edwin S. Houck and Henry C. Houck, as provided by Henry J. Houck's will. Edwin S. Houck filed exceptions to the allowance of these claims, denying the existence of the claims, repeating his defense of limitations and laches, and asserting that Mrs. Houck had theretofore filed a petition in the Orphans' Court "praying among other things, to open the accounts—for the purpose of establishing her right to" the amounts allowed her in the account of the auditor, "and after a hearing in the Orphans' Court" her petition was dismissed. Further evidence was offered, and after a hearing, the Court passed an order overruling the exceptions and ratifying the account of the auditor, and from that order Edwin S. Houck has appealed.

The appellant relies mainly upon his defense of limitation and laches, and the supposed effect of the order of the Orphans' Court dismissing Henry C. Houck's petition to open the accounts of the executrix of Harry J. Houck, and further contends that the effect of the decree of the Circuit No. 2, decreeing a sale of the property without any reference to the claims of the appellee and Mrs. Houck, is to preclude the allowance of said claims out of the proceeds of sales. In support of this latter contention he relies upon the case of *Rice v. Donald*, 97 Md. 398. In that case a bill was filed by the heirs of Mrs. Donald for the sale of the real estate of which

she was alleged to have died seized and possessed, the defendants answered admitting the facts alleged in the bill, and a decree was passed for a sale of the property. The property was sold, the sale was ratified, and the auditor stated an account, in which, after the allowance of costs, etc., and the amount of a mortgage claim, he distributed the balance to the heirs at law of Mrs. Donald. James Rice, one of the defendants, then filed exceptions to the audit, claiming that the property sold belonged to his father and that the proceeds of sale should be audited to him as the sole heir at law of his father, and it was under such circumstances that this Court, speaking through JUDGE SCHMUCKER, held that "His rights under the exceptions filed in his individual capacity must be tested from the standpoint of an original party to the suit after the passage and enrollment of the final decree for the sale of the land for the purpose of partition. That decree, construed, as it should be, with reference to the issues presented by the pleadings, determined as between the parties to the suit that Margaret Donald died intestate seized of the land described in the bill and that her heirs at law were the persons named as such in the bill and that their relationship to each other was as therein stated and that the land should be sold and the proceeds divided under the Court's direction among the persons thus ascertained to be her heirs at law according to their respective interests therein. *Pfeltz v. Pfeltz*, 1 Md. Chy. 455; *Brown v. Thomas*, 46 Md. 640. After the decree was enrolled no party to the case could, by exceptions to the auditor's account or by petition or any similar proceeding, vary or alter its effect." Here the decree for the sale of the property was passed upon the distinct agreement of the parties, forming a part of the record in the case, that all questions, as to the allowance of the claims were to be reserved and be disposed of in the distribution of the proceeds of sale, and that the decree should "in no wise" affect the validity of the claim, and it is, therefore, apparent that the rule applied in *Rice v. Donald* does not apply in this case.

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Nor can the order of the Orphans' Court, dismissing the petition of Henry C. Houck to open the accounts of the executrix of Henry J. Houck, have the effect claimed by the appellant. That Court had already passed his claim, and that was as far as it could go. It had no power to determine the rights of the claimant against the estate, or to order the payment of the claim, and its order dismissing the petition did not affect the appellee's right to enforce his claim in a Court of law or equity. In the case of *Levering v. Levering*, 64 Md. 413, the Court said: "The Orphans' Court can pass upon claims against the estates of decedents, but its determination is not final nor conclusive. If the claim is disallowed, the claimant is not precluded from seeking his remedy in a Court of law or equity. If the claim is allowed, the executor or administrator may refuse to pay it. The decision of the Orphans' Court is only *prima facie*, and if the claim is allowed, only operates as a protection extended to the executor in the event of its liquidation by a disbursement of the funds held by him in his representative capacity. * * * And 'claims of executors and administrators stand on the same footing with those presented by other creditors of deceased persons.' * * * The Orphans' Court with its limited powers and circumscribed jurisdiction, cannot finally and conclusively determine any claim brought by a creditor against the estate of a decedent. * * * The adjudication and conclusive determination of matters in controversy between an executor or administrator and creditors, appertain 'exclusively to the Courts of law and equity.'"

In respect to the defense of limitations to the claim of Henry C. Houck, it is only necessary to refer to the acknowledgment of the claim by the executrix of Henry J. Houck's estate, and by the appellant. Henry C. Houck testified as follows: "My brother (referring to the appellant) in the spring of 1905, when he was visiting in Baltimore, told me in the halls of the University of Maryland, when he was speaking of the sum of money coming to me, that every cent

of money owing to me I would receive. He informed me he received a like amount sometime about September 6, 1888." By his grandfather's will, Edwin S. Houck was bequeathed the sum of \$5,000 which was paid to him September 6, 1888, by his father, as the executor of his grandfather's estate. Viewing the statement of the witness, Henry C. Houck, in the light of that fact, it means that his brother said that there was coming to him a like sum from his grandfather's estate, and that he would receive every cent of it, and we think, upon proof of the amount due the appellee from his grandfather's estate, it was a sufficient acknowledgment of his claim to remove the bar of the statute. In *Shipley v. Shilling*, 66 Md. 562, CHIEF JUDGE ALVEY says: "The testimony of Benson is explicit to the fact that the testator admitted that the appellee had an account against him, the testator; and Hull testifies that he heard the testator say that he owed the appellee an account; though on neither occasion of making these admissions, was there any account exhibited, or specially mentioned. Such statements, it is true, are very indefinite in their nature, and do not prove, or tend to prove, the items charged in any particular account. But after the correctness of the account sued on is otherwise proved, according to the requirements of the law, such general acknowledgments, if it be found that they were intended to apply to the account so proved, will be deemed sufficient to remove the bar of the Statute. * * * But when the new promise is sought to be deduced from a general indefinite acknowledgment, such as is relied on in this case, the question is one for the jury to determine, whether the acknowledgment of the debtor within the period of limitation, applies to the original demand sued on or not. The jury must find to what debt or claim the admission or general acknowledgment referred; and if the plaintiff shows but a single indebtedness it may apply to that; or if the demand sued for be an account of several items, it may apply to any part thereof, according to the evidence and the finding of the jury. And, in such case, if the

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debtor alleges that there was a different account or demand to which the general acknowledgment referred, the *onus* of proving that fact rests upon him, as matter of defense." See also *Beeler v. Clarke*, 90 Md. 221.

But independent of any acknowledgment by the appellant, the acknowledgment of the claim by Mrs Belle Houck, the executrix of the estate, found in the record, is sufficient to bind the personal estate of Henry J. Houck, and the defense of limitations interposed by the appellant can only apply to the proceeds of sale of the real estate devised, which constitutes but a small part of the sum distributed in the audit, and could not affect the distribution made. *Spencer v. Spencer*, 4 Md. Ch. 456; *Post v. Mackall*, 3 Bland, 499; *Culison v. Owings et al.*, 6 G. & J. 4; *Gordon v. Small*, 53 Md. 559; 13 *Am. & Eng. Ency. Law*, 707. This applies also to the defense of limitations to the claim of Mrs. Houck.

The defense of laches cannot afford the appellant any greater relief. In the case of *Demuth v. Old Town Bank*, 85 Md. 326, CHIEF JUDGE McSHERRY says: "Strictly speaking and using the term as it is understood in the law, laches is such neglect or omission to assert a right as, taken in conjunction with lapse of time more or less great, and other circumstances causing *prejudice* to an adverse party, operates as a bar in a Court of equity. * * * Obviously, then, there must be a legal duty to do some act, a failure to do that duty and attendant circumstances which cause *prejudice* to an adverse party before the doctrine can be successfully invoked." In this case the appellant was not entitled to receive any part of the estate of Henry J. Houck, until Henry C. Houck arrived at the age of thirty years and the failure of Henry C. Houck and Mrs. Belle Houck to assert their claims before that time could not, in any way, have prejudiced him.

After carefully considering the evidence in the case we do not find any reason for refusing to allow either of these claims. Mrs. Houck was entitled, under the terms of her husband's will, to the enjoyment of his estate until her son,

Henry C. Houck, arrived at the age of thirty years. Having paid the amounts allowed by the auditor she was entitled to be reimbursed out of the estate. The uncontradicted evidence in the case is to the effect that Henry J. Houck received from the insurance company \$2,977.97 on account of the policy bequeathed to him in trust for his son, Henry C. Houck, and that he mingled the same with his own estate. If he had lived until his son arrived at the age of twenty-one years, he would have been liable for the amount so received by him with interest thereon, and there is no reason why his estate should not be required to pay the same amount. The auditor only allowed interest on this claim from the time the money was received by Henry J. Houck to the time when Henry C. Houck became twenty-one years of age, and as Henry C. Houck has not appealed that allowance will not be disturbed. But Mrs. Houck was only entitled to the balance of the estate of her husband remaining after the payment of his debts. At the time she, as administratrix, settled his estate she should have accounted for the amount due Henry C. Houck, and was not entitled to receive, for her own use, the income on that amount. As she did not do so, but received and enjoyed the income from the *whole* estate, including the amount due Henry C. Houck, no part of the interest on the \$2,977.97, from the time she settled the estate to the time he reached the age of twenty-one years, should be charged against the share of Edwin S. Houck, who was receiving no benefit from the estate of his father. One-third of the interest allowed by the auditor on the \$2,977.97 from the time the executrix stated her first account in the Orphans' Court to the time Henry C. Houck became twenty-one years of age, should, therefore, be added to the amount distributed by the auditor to Edwin S. Houck and be deducted from the amount distributed to Mrs. Belle Houck, and the order of the Court below will be affirmed as to the claim of Henry C. Houck, and reversed as to the claim allowed Mrs. Belle Houck, and the case will be remanded in order that the Court may, in ratify-

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ing the account of the auditor, require the trustees, in paying out the trust fund, to make such addition to the amount distributed to Edwin S. Houck and deduct the same from the amount allowed Mrs. Belle Houck on account of her claim. it appearing that she has received her share of the balance of the estate.

Order affirmed in part and reversed in part, and case remanded for further proceedings in accordance with the views herein expressed, the appellant and Mrs. Belle Houck each to pay one-half of the costs in this Court and the costs of the exceptions to the audit in the Court below.

JOHN WORTHINGTON vs. SARAH C. WORTHINGTON, EXECUTRIX, ET AL.

*Competency of Witness When Other Party to Transaction is Dead—Exception to Testimony in Equity Too
General—Claim Against Estate of Decedent—Insufficient Evidence.*

Under Code, Art. 35, sec. 3, in an action by or against executors or distributees of a decedent, no party to the cause is competent to testify as to any transaction had with the decedent unless called by the other party. In an equity suit against an executor and devisees, where much evidence was taken, the plaintiff excepted to so much of the testimony of four named witnesses "as purports to give transactions alleged to have been had with and statements made by" the deceased. *Held*, that this exception is too general, since these witnesses were competent to testify as to some matters, and the exception does not designate the particular questions and answers alleged to be inadmissible. The Court cannot be required by such an exception to examine the whole testimony

and pick out such questions and answers as are objectionable, because the witness was incompetent to testify as to that particular matter.

When a party to a cause is incompetent to testify as a witness to transactions had with a decedent, that part of his testimony which leads up to, or is in explanation of, his testimony as to such transaction, is likewise inadmissible.

The bill in this case filed by the daughter and son-in-law of a testatrix against her executor and devisees alleged that the decedent was indebted to the plaintiffs on account of services rendered and farm products furnished during a period of more than thirty years before her death. The account consisted of entries made in lead pencil, partly on the fly leaves of an old book, all in the handwriting of the daughter, and all apparently with the same pencil or precisely the same kind of pencil, during the whole thirty years. There was nothing to show that the claimants had made any effort to collect the debt until after the death of the testatrix and after the death of her surviving husband. After most of the alleged indebtedness had been incurred many transactions took place between the parties; the testatrix had conveyed a farm to her daughter and had given money to her daughter's children, and by her will had devised property to them. *Held*, that the evidence fails to establish the validity of this claim, and that the bill seeking its enforcement against the real estate of the decedent should be dismissed.

Decided January 12th, 1910.

Appeal from the Circuit Court for Harford County (VAN BIBBER, J.).

The cause was argued before BOYD, C. J., PEARCE, SCHMUCKER, BURKE, THOMAS and PATTISON, JJ.

J. J. Archer and A. F. Brown, for the appellant.

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John S. Young and Thos. H. Robinson (with whom were *P. L. Hopper* and *Jos. W. Chamberlain* on the brief), for the appellee.

PATTISON, J., delivered the opinion of the Court.

The appeal in this case is from the decree of the Circuit Court of Harford County, in equity, dismissing the bill as to the appellant and disallowing his claim.

This suit was instituted by the appellant, John Worthington, and his daughter, Blanche W. Ely, against the executrix and devisees of Sarah H. Slymer, deceased, asking for the sale of the real estate of the said Sarah H. Slymer for the payment of her debts, on account of the insufficiency of the personal estate of the said deceased. The bill states that Sarah H. Slymer was, in her lifetime, indebted unto the appellant and Sarah C. Worthington, his wife, upon an open account, to the amount of \$3,504.45, including interest; that after the death of the said Sarah H. Slymer all the right and interest of the said Sarah C. Worthington in and to said claim was assigned unto her husband, John Worthington. And that the said deceased was, also, indebted unto the said Blanche W. Ely in the sum of \$132.00, upon an open account, for nursing said deceased, and care of her house, etc., with interest thereon from the first day of October, 1902. That the said Sarah H. Slymer departed this life on or about the first day of October, 1902, seized and possessed of real and personal estate in the city of Havre de Grace, Harford County, Maryland, which, by her will, she devised as follows: one house and lot of land she devised unto her husband, Andrew F. Slymer, in lieu of his curtesy in her estate, which Andrew F. Slymer, after her death, conveyed to the defendant Mary A. Mitchell, wife of Robert O. Mitchell, subject to a mortgage to the Columbian Building Association of Harford County, for six hundred dollars, and to the payment to Joseph Hankeln of two hundred dollars; another lot of land she devised to her granddaughter Blanche W. Ely, wife of Clinton C. Ely, in fee simple; another lot of land she devised

to her granddaughter Margaret A. Botts, wife of Archer M. Botts, for life and at her death to her children then living, and providing if she should die without leaving issue, then to the defendant, Sarah C. Worthington in fee; and after a small bequest to Caroline or Goldie Taylor, she devised and bequeathed all the rest and residue of her estate, real and personal, unto her said daughter, Sarah C. Worthington, and appointed her executrix. The bill then states that the personal estate was of small value and insufficient to pay the debts of the deceased, and that the plaintiff and the other creditors were entitled to have their claims paid out of the real estate, and prays that it be sold for that purpose.

Joseph Hankeln, a non-resident defendant, failed to appear and answer said bill and a decree *pro confesso* was obtained against him. All the other defendants appeared and answered.

The answers of the Columbian Building Association of Harford County and Mary A. Mitchell and Robert O. Mitchell, her husband, after denying the indebtedness of the deceased to the plaintiffs or either of them, allege that the claim of John Worthington upon which he bases his complaint, is the claim of Sarah C. Worthington who assigned it to him. That the decedent in her lifetime conveyed and assigned unto Sarah C. Worthington real and personal property of great value, which was intended by her as a gift to her daughter and was to be a complete acquittance of all claim which her said daughter might make against her or her estate. And that subsequent to the death of the deceased, Andrew (Anthony) F. Slymer conveyed unto Mary A. Mitchell the property so devised to him, subject to the mortgage of the Columbian Building Association, as alleged in the bill. The answers further allege that the property so devised unto Andrew F. Slymer, although standing in the name of Sarah H. Slymer, never in fact belonged to her, but was the property of her husband, Andrew F. Slymer; that it was purchased and paid for by him but at his request was conveyed to her; that the devise so made to him was in recognition of the facts above

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stated and was intended to perfect his title to said property; that after the death of Sarah H. Slymer, Andrew F. Slymer expressed himself dissatisfied with the terms of her will and made known his intention to renounce it, but he was dissuaded from such course by Sarah C. Worthington, and in consideration therefor he was paid by Sarah C. Worthington, acting for herself and the other devisees, a large sum of money; that during these negotiations neither Sarah C. Worthington nor Blanche W. Ely ever revealed to him that they, or either of them, held secret claims against the estate of his wife, and that had he known of such claim he would not have accepted the settlement; that in consequence of their deceitful action the plaintiffs are estopped from setting up any claim that would diminish his interest in the estate. The answer pleads limitation and denies the insufficiency of the personal estate of the decedent to pay and discharge all her just debts due and owing at the time of her death.

The answer of Margaret A. Botts and Archer M. Botts, her husband, also denies all indebtedness of the decedent to the plaintiffs or either of them, and alleges that the testatrix, Sarah H. Slymer, never knew of the existence of the alleged claim or that she was being charged with the same during her lifetime. The answer further alleges that on the fifth day of August, 1872, at a time when the claim of Sarah C. Worthington and husband amounted to more than four hundred dollars, the decedent, in consideration of natural love and affection, conveyed to Sarah C. Worthington a valuable farm containing eighty acres of land. The answer further alleges that Sarah C. Worthington, as residuary legatee, took real and personal property amounting in value to at least three thousand dollars; and that the only debts filed against the estate, except the claims of the plaintiffs, were two small ones, amounting in the aggregate to \$40.73. The answer further alleges that on the 22nd day of April, 1901, the testatrix assigned to the said Sarah C. Worthington a mortgage for five hundred dollars, and that on the 20th day of August, 1902, a short while before the death of the testatrix, she as-

signed a mortgage for two thousand dollars unto her three grandsons, William Nelson, John Parker, and George Mitchell Worthington, sons of Sarah C. Worthington. The answer also pleads limitation.

To sustain the issues joined, a number of witnesses were examined and a vast deal of testimony taken, the same covering over four hundred pages of the printed record.

Both the plaintiff and defendant filed exceptions to the admission of much of the testimony taken. Upon the submission of the case to the Court below, it allowed a portion of the claim of Blanche W. Ely, but dismissed the bill as to the plaintiff John Worthington and disallowed his claim. From this order or decree the appellant appealed to this Court. We will first consider and dispose of the exceptions.

The plaintiff excepted "to so much of the testimony of the (defendants) witnesses, Robert O. Mitchell, Archer M. Botts, Mrs. Margaret Botts and Mrs. Mary A. Mitchell, as purports to give transactions alleged to have been had with, and statements made by Sarah H. Slymer, deceased, whose executor, Sarah C. Worthington, is a party defendant to this suit, because the said Robert, Archer, Margaret and Mary are each parties defendants in said suit." The Court below held that this exception was too general and overruled it.

Sec. 3 of Art. 35 of the Code provides: "In actions or proceedings by or against executors, administrators, heirs devisees, legatees or distributees of a decedent as such, in which judgments or decrees may be rendered for or against them, and in proceedings by or against persons incompetent to testify by reason of mental disability, no party to the cause shall be allowed to testify as to any transaction had with, or statement made by the testator, intestate, ancestor or party so incompetent to testify, either personally or through an agent since dead, lunatic or insane, unless called to testify by the opposite party." This statute does not make parties to a cause incompetent to testify as to all matters, but only to such matters as are prohibited by it. This Court in the case of *Smith v. Humphreys*, 104 Md. 289, in reference to this sec-

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tion of the Code, said: "The appellees are therefore in error when they said in their brief that the Act of 1904 restored the provisions omitted from the Act of 1902, and as they excepted to 'all the testimony' of Mrs. Smith 'on the ground of her incompetency to testify as a witness in this case,' such exception could not be sustained, if she testified to anything that the statute does not prohibit, because it is too general. Under such an exception the Court is not required, and it cannot be expected, to go through the testimony and pick out such questions as are objectionable because the witness is incompetent to speak of the subject referred to; * * * that the defendants should have excepted to designated questions and answers, on the ground of the incompetency of the witness, if they desired the exceptions to be passed on by the Court below, or by this Court, and not having done so, they cannot be excluded under that general exception to her incompetency as a witness."

While this exception does not go to all the testimony of the witnesses on the ground of their incompetency to testify, yet it, in general terms, excepts to so much of the testimony as purports to give transactions alleged to have been had with and statements made by Sarah H. Slymer, deceased, whose executrix is a party defendant, thereby imposing upon the Court the task of going through the testimony and picking out such questions as are objectionable, because of the reason stated. Much of the testimony of these witnesses is in relation to matters about which they are perfectly competent to testify. The plaintiffs should have excepted to designated questions and answers, if they desired the exception to be passed upon by the Court below or by this Court, and not having done so the exception was properly overruled.

The defendants first excepted to all of the testimony of each of the plaintiffs, John Worthington and Blanche W. Ely, on the ground of their incompetency as witnesses, and then excepted to such testimony specifically, each question and answer objected to being designated. The Court below

sustained this exception and excluded the whole of their testimony.

This testimony we have carefully examined and find that every part of it, as is expressed by the lower Court, "is either leading up to or in explanation of the testimony given by them where they are unquestionably incompetent to testify," and therefore no part thereof was admissible. Consequently the Court below committed no error in excluding this testimony. This disposes of the exceptions that are before us.

After a careful consideration of this case, we have reached the conclusion that the claim of the plaintiff should not be allowed him. We find many facts and circumstances in connection therewith that necessarily lead us to this conclusion. This claim, which was originally the property of John Worthington and Sarah C. Worthington, his wife, son-in-law and daughter of Sarah H. Slymer, who departed this life October 1st, 1902, had its origin so early as the year 1871, the first item of charge in this account being dated April 20th of said year. We find the account was entered in lead pencil upon the fly leaf of an old volume of Gummere's Surveying. As shown by this book, numerous items were charged in said account, starting with the said 20th day of April, 1871, and ending September 21st, 1887, and included charges for board, mending clothes, and for farm products of all kinds said to have been furnished to the said Sarah H. Slymer. It seems that the account after September 21st, 1887, was kept in a small account book, in which other written memoranda are found. The account itself starts in the middle of the book, the first item therein being October 28, 1887, and the last item of charge October 28, 1901. The account therefore covers a period of more than thirty years. All the items in the first book are in lead pencil, and while the writing is lightly shaded and in some respects difficult to read, nevertheless it has a freshness that could hardly be expected to exist after a lapse of more than thirty years. These charges, as stated, were made upon the dates of their alleged entries, and yet, in the case of most of them, they appear to have the

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same shading and we might say to have been written with the same pencil, or at least with a pencil of the same softness, and yet it is hardly possible that the same pencil or a pencil of like softness was used during this long period of time. All the items of charges in these books are in the handwriting of Mrs. Worthington, as testified to by her, and yet, as shown by her testimony and the testimony of the family, she, during the period covered by this account, was sick for long intervals of time and for weeks would be confined to her bed. Nevertheless, the items at all times are entered in her handwriting.

Mr. and Mrs. Worthington were married in February, 1871, and this account was opened in April following. On the fifth day of August, 1872, at a time when this account amounted to more than four hundred dollars, Mrs. Slymer, then Mrs. Nelson, in consideration of natural love and affection, conveyed to her daughter a farm, subject to the payment of one-half of a mortgage of one thousand dollars resting thereon, which farm was, a few years thereafter, sold by Mrs. Worthington for thirteen hundred dollars. Mrs. Worthington, in her testimony, states that her mother had full knowledge of the existence of this claim at that time and, in fact, had previously suggested to her to open the account and instructed her as to the manner in which it should be kept. At that time, however, no reference whatever was made to the existence of this claim, it was absolutely ignored. Later, on the 20th day of August, 1902, when the whole of this indebtedness, as alleged, had been incurred by her, Sarah H. Slymer, with the full knowledge of her daughter, assigned unto William Nelson, George Mitchell and John Parker Worthington, her grandsons, sons of Mrs. Worthington, a mortgage held by her upon the lands of Price Hoopes, in Harford County, upon which mortgage there was owing at that time the sum of two thousand dollars. This, as shown by the uncontradicted testimony in the case, was a gift on her part to her grandsons. This gift was made by her at a time when we are told by Mrs. Worthington that her mother was claiming to her that she had no money with which to make a pay-

ment on this indebtedness. In the disposition of her property under her will, there is no allusion whatever made to this indebtedness, nor is there anything in the will at all consistent with the fact that she had any knowledge of the existence of said indebtedness. She devised specific real estate to the different persons therein mentioned, and concludes with devising all the rest and residue of her estate to her daughter, Mrs. Worthington, without making any provision at all for the payment of this indebtedness, which, if paid, would have consumed about one-half of her estate, and yet Mrs. Worthington would have us believe that her mother, Mrs. Slymer, had full knowledge of this indebtedness.

By the will of Mrs. Slymer, Mrs. Worthington was appointed executrix. Shortly after the death of her mother in 1902, letters testamentary were issued to her and she proceeded with the settlement of the estate. Mr. Slymer, husband of the decedent, not being satisfied with the terms of the will, was disposed to renounce it. Mrs. Worthington learning of this fact, went to her daughters, Mrs. Ely and Mrs. Botts, devisees under the will of Mrs. Slymer, and suggested to them that arrangement be made to pay unto Mr. Slymer an amount, three hundred and twenty-five dollars, which he had agreed to accept in consideration that he would not renounce the will, and suggested to them that they jointly raise and pay over to him this sum of money and that it be apportioned among them according to the value of the property so devised unto them, in order that their property would not be subjected to sale for the payment of that alleged indebtedness. This was done, Mrs. Botts paying, as her part, the sum of one hundred and thirty-nine dollars. At this time Mrs. Botts, as alleged by her, had no knowledge whatever of the alleged claim of the plaintiff in this case, and from this act of hers we are convinced of the truthfulness of this statement, as we cannot imagine that a person of any business intelligence whatever would have contributed one hundred and thirty-nine dollars to the payment of an indebtedness of three hundred and twenty-five dollars in order to save her

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property when she had knowledge that there still existed an indebtedness of three thousand dollars for which her property would likewise have been subjected to sale.

On June 30th, 1903, after the settlement with Mr. Slymer, and after his death, and not until then, this claim was filed against the estate. In the meantime, Mrs. Worthington, the executrix, had assigned all her interest in it to her husband, the consideration therefor being, as disclosed by the testimony, the conveyance by him of all his right, title and interest, as husband, in and to the farm owned by his wife upon which they then resided. The avowed purpose of such an assignment, as we are told by Mrs. Worthington, was for the collection of the claim, she saying that as "I was executor of mother's estate I could not collect it against her estate." Upon the assignment of the claim to her husband, he together with his daughter, Mrs. Ely, on the fifth day of August, 1903, filed the bill in this cause asking for the sale of the lands of which the decedent died seized and possessed, including those that were devised to Mrs. Botts, for the payment of her indebtedness, including the claims of the plaintiff. The testimony discloses that this was the first effort made to enforce the payment of this claim, the first items of which are said to have been entered or charged more than thirty-two years before, and the bill was filed, so far as the testimony discloses, without full information being imparted to Mrs. Botts of the existence of this claim.

Mrs. Worthington being called by the opposite party, was permitted by the Court below to testify. In commenting upon her testimony, we will simply say that it was clearly shown by it that it was her wish that this claim should be allowed. The conduct of Mrs. Worthington, as well as other facts to which we have not alluded, cast grave suspicions upon the correctness of the plaintiff's claim.

We think the Court committed no error in dismissing this bill and in refusing to allow plaintiff's claim. We therefore affirm the decree with costs to the appellee.

Decree affirmed with costs.

THE SMITH PREMIER TYPEWRITER COMPANY
vs. SIMON W. WESTCOTT.

*Writ of Summons in Action Against Corporation—Jurisdiction of Justice of the Peace—Waiver of Summons—
Appeal from Judgment of Circuit Court
on Appeal from Justice.*

In an action against a corporation, the writ of summons must be directed to it, and not to an officer or agent, although service must be made upon an officer or agent. Under a summons against "J. L., agent," without more, no jurisdiction is acquired under which a valid judgment can be rendered against the corporation of which he is an agent.

A suit was brought before a Justice of the Peace against a corporation, and the writ of summons was directed to "J. L., agent," and served on him. The Justice gave a judgment against the corporation, which did not appear before him. On appeal to the Circuit Court, the corporation filed a motion stating that it "objects to the trial of this case, and asks that the appeal be dismissed upon the ground that the Justice of the Peace below was without jurisdiction to try the case." *Held*, that although a motion to quash the proceedings would have been more regular, yet this motion raised the question as to the validity of the summons, and was not a waiver by the corporation of its right to be summoned directly.

When a Justice of the Peace renders a judgment against a party not summoned and over whom, therefore, he had no jurisdiction, the fact that that party appeals from the judgment is not a waiver of a summons or a consent to the jurisdiction.

An appeal lies to this Court from a judgment of the Circuit Court on appeal from a Justice of the Peace, when the Justice had no jurisdiction of the case, because the defendant had not been summoned.

Decided January 12th, 1910.

Md.]

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Appeal from the Circuit Court for kent County (ADKINS, J.).

The cause was argued before BOYD, C. J., SCHMUCKER, BURKE and THOMAS, JJ.

B. H. Hartogensis (with whom was *Hope H. Barroll* on the brief), for the appellant.

William W. Beck and *Lewin W. Wickes*, for the appellee. submitted the cause on their brief.

BOYD, C. J., delivered the opinion of the Court.

This is an appeal from a judgment rendered by the Circuit Court for Kent County in a case appealed from a Justice of the Peace of that county—the appellant contending that the Court and Justice were without jurisdiction to enter the judgment against it. The transcript from the justice's docket shows that the case was docketed as follows: "Simon W. Westcott, by his father and next friend, George B. Westcott, v. Smith Premier Typewriter Company. J. L. Wilson, agent." The only summons in the record directed the sheriff to summon "J. L. Wilson, agent." It was returned "Summoned." Mr. Wilson filed an affidavit in which he swore that he was a resident of the City of Baltimore, and denied the right of the plaintiff to sue him in Kent County; that he had no power or authority to accept service of process for the Smith Premier Typewriter Company, which was a foreign corporation, for which he was merely a salesman and which had its principal office in Baltimore, and he therefore declined to recognize the validity of the process served on him. He described himself throughout the affidavit as "agent for the Smith Premier Typewriter Co.," and so signed it, as well as individually, but it is admitted in the agreement of counsel that the company was not mentioned in the summons.

The case was set for trial before the Justice on November 25, 1908, at 10 o'clock A. M. At that time the plaintiff ap-

peared with his witnesses and counsel, but there was no appearance by the defendant. The trial proceeded *ex parte*, resulting in a verdict for the plaintiff for the amount claimed. On the same day Mr. Barroll wrote a letter to the Justice in which he stated he had heard accidentally at five minutes of ten o'clock, through a witness, that the case had been set for trial that day. He claimed that he did not have notice of the trial, and hence had no opportunity to appear or summon witnesses and ordered an appeal to be taken to the Circuit Court. He spoke of the case in his order for the appeal as against "J. L. Wilson, agent for the Smith Premier Typewriter Company," and seemed to treat the case as against Mr. Wilson, as he spoke in the letter of his client residing in Baltimore.

The day the case was heard in the Circuit Court Mr. Barroll filed what is spoken of in the record, as a "motion objecting that Court is without jurisdiction." It is as follows: "The appellant objects to the trial of this case and asks that the appeal be dismissed upon the ground that the Justice of the Peace below was without jurisdiction to try the case, and consequently this Court is also without jurisdiction to hear and determine it upon its merits. The appellant calls the Court's attention to the fact that the writ of summons in this case was directed against 'James L. Wilson, agent,' and that the same contained no notice to the appellant of the character of the suit, and neither a copy of said summons or other valid notice was served upon the appellant, and because the appellant is a non-resident corporation, with its principal place of business in the City of Baltimore, and while James L. Wilson, is its salesman, he is not an agent authorized to receive service of process under the Code of Public General Laws of this State."

The Court overruled that motion, and granted one made by the plaintiff to strike out the name of J. L. Wilson, agent. A jury was empaneled and a verdict rendered for the plaintiff, on which judgment was rendered and an appeal to this Court entered on the ground that neither the Justice nor the

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Court below had jurisdiction to enter a judgment against the appellant.

The only summons set out in the record, being simply against "J. L. Wilson, agent," was insufficient to require the company to appear. It summoned "J. L. Wilson, agent," to appear before the Justice, "to answer an action at the suit of Simon W. Westcott in a plea of debt on acct." If a judgment had been rendered by default against the company on such summons, it would have been a nullity, because the Justice thereby did not acquire jurisdiction over it. There is no special pleading before a Justice of the Peace, but in order to require a corporation to appear before one, there must be a summons *for the corporation*, unless, of course, it is waived. It may be served upon an officer or agent of the corporation, according to circumstances, but the suit must be *against the corporation* in order to bind it. The principle is thus stated in 20 *Ency. of Pl. and Pr.*, 1136: "A writ against a corporation, to be sufficient to sustain a judgment against such corporation, must run against it, and not against the officer or trustee, who might in law represent such corporation, and a citation addressed to an agent is no notice to the principal." We understand that to be a correct statement of the law on the subject.

It is true that Wilson seemed to understand whom the summons was intended for, and described himself as agent for the company in the affidavit he filed, but we are dealing with the rights of the company and not with those of Wilson alone. Of course the company could waive the absence of a summons, but we do not find such waiver. While the motion made by counsel in the Circuit Court is peculiarly worded--probably inadvertently asking that the appeal be dismissed--it was intended to make the objection that the Court was without jurisdiction to hear the case, as it expressly stated that the Justice was without jurisdiction to try it, and that the Court was without jurisdiction to hear and determine it upon its merits. The motion called the attention of the Court to the fact that the summons was directed against "James L.

Wilson, agent." So it is clear that he did not intend to waive the question of jurisdiction.

It was said in *N. C. R'y Co. v. Rider*, 45 Md. 24, in speaking of a return of the sheriff, that: "It ought to appear affirmatively upon what person or persons the process was served, so that the Court could judge whether it was in law a valid service upon the company, otherwise that would be left to depend upon the judgment or discretion of the sheriff. A return that process had been served on the corporation and the company summoned, does not show that the law has been complied with; the corporation is a mere entity existing in the mind, and can neither act itself, nor be affected by legal proceedings except by and through its authorized agents." And the Court said it was questionable whether a return to a writ of attachment if laid "in the hands of the Northern Central Railroad Co. and summoned company as garnishee" was sufficient, but decided the case on another ground. Under our statute, after providing for service on foreign corporations upon the resident agent, if there be one, as required by section 68 of Article 23, and if there is not, upon certain other officers or agents, it is provided: "In all cases, however, the copy of the process shall be left with the person upon whom it is served; and where process is served upon any person other than the resident agent, president, director, or other officer of the corporation, a copy of the process shall also be left at its principal office in this State, if there be one named as aforesaid." Section 67 of Article 23 as amended by Act of 1908. The object of such a provision is to give the company information about the process against it, and it is evident that a copy of this summons would have been of no avail for that purpose, but might well have misled the officers of the company into the belief that the plaintiff was undertaking to hold its agent personally responsible for some debt.

The question principally argued was whether service on J. L. Wilson was such service on the company as was authorized by the present statute, but we are of the opinion that the summons itself was radically defective to bind the company,

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and hence it is not necessary to determine whether service on Wilson, under a summons *against the company*, would have been valid.

The only remaining question we will consider is whether an appeal lies to this Court. It must, of course, be admitted that "No appeal lies to this Court from a judgment of a Circuit Court, affirming a judgment of the Justice of the Peace, unless it affirmatively appears from the record, that the Justice rendering the judgment and the Court affirming it upon appeal, were without jurisdiction of the case." *Cole v. Hynes*, 46 Md. 181. The appellee contends that the Circuit Court had the right to decide the question of jurisdiction, and the appellant having invoked its decision on that question the judgment is final and conclusive, and there is no appeal to this Court. The case of *Josselson v. Sonneborn*, 110 Md. 546, is largely relied on to sustain that contention. But in that case the question was merely whether the summons, which was issued against the defendant, was sufficient, and there was no such question as there is in this case—whether jurisdiction over the person was acquired by a summons issued against another person, and not against the defendant. The summons in that case did not show that the tenancy was for a less term than three calendar months, and, inasmuch as under the local law of Baltimore City the remedy of distress for rent under such a tenancy is taken away, but the landlord is authorized to take proceedings to repossess the premises, it was contended that the summons should have shown that the tenancy was for less than three months, and that there was a defect in the affidavit, which affected the jurisdiction of the justice and of the Baltimore City Court on appeal. This Court said: "Assuming, without so deciding, that both the affidavit and the summons are insufficient, these were questions which the appellant submitted to the lower Court for its decision. That Court had a right to decide them, and its decision, whether right or wrong, cannot be reviewed." Again, it was said: "The Baltimore City Court undoubtedly had the right to decide upon the suffi-

ency of the affidavit and summons. This right was recognized by the appellant by his act in asking its judgment upon those questions by the motion to quash." JUDGE BURKE quoted from the case of *New York Mining Co. v. Midland Co.*, 99 Md. 512, where CHIEF JUDGE McSHERRY said: "Whatever subject-matter in the controversy the Court below had the right to decide was necessarily a subject-matter within the jurisdiction of that tribunal. Accordingly, the inquiry here is, not whether the trial Court rightly decided, but whether it had the right to decide what it did decide. If it had the right to decide what it did decide, then, though its decision be, in point of fact or of law, erroneous, it cannot be reviewed, because the statute has conferred no power upon this Court to sit in review of such a judgment." We have applied that principle in a number of cases involving the constitutionality of statutes, for example, in *Raynor v. State*, 52 Md. 368; *Judefind v. State*, 78 Md. 216; *Arnsperger v. Crawford*, 101 Md. 247, and others.

It will be noticed that the quotation from CHIEF JUDGE McSHERRY'S opinion in the *Mining Company's Case*, *supra*, began by stating: "Whatever *subject matter* in the controversy the Court had the right to decide was necessarily a subject-matter within the jurisdiction of that tribunal." In order to give validity to a judgment, the tribunal must have jurisdiction of the person as well as of the subject-matter—unless, of course, it be a proceeding *in rem*, or of that nature. If the tribunal has acquired jurisdiction of the person, by service of its process or by consent, it can determine any subject-matter of which it has jurisdiction, and whether rightly determined or not, it is final, unless the right to review its determination is given some other tribunal, but if it has not acquired jurisdiction of the person then it has no right to decide the controversy about the subject-matter. JUDGE McSHERRY concluded the opinion in 99 Md. by saying that the exceptions before the Court "in the last analysis relate merely to the correctness of the Circuit Court's judgment, and in

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no way concern or affect its jurisdiction over the subject-matter and the parties then before it."

There is a manifest distinction between the two classes of cases, such as *Josselson v. Sonneborn* on the one hand, and that now before us on the other. In the former the defendant was brought before the Court by a summons, and whether the summons was defective was a question which the Baltimore City Court not only had the right, but was required to determine, and hence its determination was final, no appeal being provided for, but in this case, as there was *no summons* against the defendant, and it did not voluntarily appear, excepting to object to the jurisdiction, the Court below had no jurisdiction over the person, and hence could not validly enter up judgment. It had no right to decide any question affecting the appellant unless it had acquired jurisdiction over it by service of process directed to it or by consent.

If our inquiry was simply whether Wilson was such an agent as could be served with process, directed to the Company, we would have more doubt about our right to review the decision of the Circuit Court. That might be said to be a question which the justice and the Circuit Court had the right to decide, and we do not want to be understood as determining that in such case we would review the action of the lower Court. But this case, as presented by the record, involves the question whether the action of the Circuit Court is final, although it rendered a judgment, against the protest of the company, when it appears that the process was directed to J. L. Wilson, agent, and not against the company. It is not a question of the sufficiency of a summons or of service, but of the effect of the absence of a summons against the company. If judgment can be entered against a corporation, which is final and beyond the review of this Court, on such a summons and service as this, why not in a case against an individual, when process is issued against his agent? If A. B. is the agent of C. D., could a valid judgment be rendered against C. D. on a summons directed to A. B., agent, and served upon him alone? And if a Justice and the Circuit

Court, on appeal, held that it could be, would there not be a right of appeal to this Court? If not, then it is idle to say that there can be an appeal if the Justice and lower Court do not have jurisdiction, for there can be no doubt that they would be without jurisdiction in such case, unless process and service be waived. It is probable that the Judges of the Circuit Court had their attention directed to the question which seems to have been mainly relied on, whether service on Wilson was such service as the law authorizes and not particularly to the entire absence of process against the company.

It cannot be said that merely because the appellant took the appeal it consented to the jurisdiction over the person. As it in fact knew of the proceeding before the justice, it not only should not be precluded from taking the appeal, but should be encouraged in adopting such course. In some cases this Court has decided that the proper remedy to obtain relief from judgments rendered by Justices of the Peace, on the ground that they had not jurisdiction to enter them, was by appeal. *Brumbaugh v. Schnebly*, 2 Md. 320, citing the earlier case of *Derickson v. Predeaux*, the opinion in which is given in the note in 2 Md. 325; *Ahern v. Fink*, 64 Md. 161. and *Home Life Ins. Co. v. Caulk*, 86 Md. 385. But without meaning to hold that equity could not have relieved against a judgment such as this, where there was no summons, and no waiver of it before the Justice, it is clear that the appeal cannot be held to be a waiver.

We had some question about the effect of the appellant embodying in its motion objecting to the jurisdiction of the Justice and of the Court a request to dismiss the appeal, but as proceedings before a Justice of the Peace and on appeal to the Circuit Court, are not required to be conducted in as formal a manner as those originating in Courts of record, we have treated the paper filed as a sufficient objection to the jurisdiction to enable us to review the case—although a motion to quash the proceedings would have been more regular. The agreement of counsel as to the facts, to which a certificate of one of the judges was attached, was not filed until August

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5th, 1909, but apparently that was by consent. It is not material, however, as the only reference we have made to it is to show that the company's name did not appear on the summons, which fact is shown by the summons itself, which is in the record.

So, although we regret the necessity for disturbing such a small judgment, we feel compelled to do so. We will reverse the judgment, without prejudice, so that a new suit can be brought if desired. The motion to dismiss the appeal must, by reason of the conclusion we have reached, be overruled.

*Judgment reversed without prejudice, the
appellee to pay the costs.*

MARIE EULER vs. WILLIAM C. SCHROEDER ET AL.

*Borrowed Money Used in Purchase of Land—Resulting
Trust—Mistake of Law.*

A resulting trust is not created by the circumstance that the borrower of a sum of money used it in part payment for a parcel of land purchased in his own name, although the lender was of the opinion that he would have an equitable lien on the land for the repayment of the loan, when there was no representation or promise by the borrower to that effect.

A mistake by a party as to the legal effect of a contract he makes affords no ground for relief in equity when there are no circumstances of fraud or undue influence.

Decided January 14th, 1910.

Appeal from the Circuit Court No. 2 of Baltimore City
(SHARP, J.).

The cause was argued before BOYD, C. J., PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and UERNER, JJ.

Harry K. Brooks (with whom was *Albert M. Sproesser* on the brief), for the appellant.

Joshua Horner, Jr., and *Walter D. Eiseman*, for the appellees.

SCHMUCKER, J., delivered the opinion of the Court.

This is an appeal from a decree of Circuit Court No. 2 of Baltimore City sustaining a demurrer and dismissing the bill of complaint to which it had been filed.

The bill of complaint, alleges that the appellees Schroeder and wife "secured from your oratrix (the appellant) the sum of one thousand dollars (\$1,000) cash money for the purpose of purchasing the leasehold property known as No. 728 Dukeland Avenue," in Baltimore City. "That the said sum of one thousand dollars was thereupon applied and used for and on account of part payment for said property," but the appellees took the title thereto in their own names as joint tenants and gave a mortgage on it to a loan company for \$1,500, that being the remainder of the entire purchase money of \$2,500, which was stated in the bill to be about the value of the property.

Then comes the following paragraph: "That although the said property was purchased in the names of the said defendants nevertheless your Oratrix believed at the time of turning over to the defendants said sum of one thousand dollars and, until a short time ago, rested under the belief and in confidence that it was mutually agreed and understood between said defendants and herself that she, your Oratrix, had and was entitled to have an equitable interest in and to said leasehold property; and herein she avers that she has an equitable interest, right and title in and to said property to the amount and extent of her aforesaid one thousand dollars therein invested; and your Oratrix further represents unto your Honor

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that it was agreed and promised by said defendants that she should receive from her said investment certain and regular installments of interest money, but that said defendants have since failed and refused to pay the same or any amount or amounts thereof."

It is further alleged that the plaintiff "is eighty-four years of age a German woman uneducated in the English language and has had practically no business experience" and did not properly understand the transaction "when she turned over the \$1,000 to the defendants" and that it was "turned over" to them "through mistake and ignorance on her part and advantage taken thereof by said defendants, and also through the undue influence used and practiced on her by the defendants."

The bill further states that the defendants "refuse to recognize the equity right and interest of the plaintiff in the property, and it charges on information and belief that they are about to sell the property and exclude her from any share in the proceeds of its sale.

The prayer of the bill is that a trustee may be appointed to sell the property and distribute the proceeds of sale amongst all parties concerned as their interest may appear, and for an injunction *pendente lite* and for general relief.

At the hearing of the case upon the demurrer an order was passed sustaining the demurrer with leave to the plaintiff to file an amended bill of complaint within ten days. It was only after her failure to avail herself of the opportunity thus afforded her to perfect the statement of her case, if it had been possible for her to do so, that the decree, dismissing the bill was passed. We therefore conclude that the bill as filed contains the most favorable statement of the plaintiff's case of which it is susceptible.

We agree with the learned Judge below that this bill does not state a case entitling the appellant to equitable relief.

It is a well settled and familiar principle of equity pleading that every bill of complaint must contain a clear statement of the facts upon which the plaintiff relies for relief as

it is from those facts alone that the Court derives its jurisdiction. *Lamm v. Burrell*, 69 Md. 274; *Payne v. Payne*. 97 Md. 685.

Where the bill asks for an injunction, as it does in the present case, "a full and candid disclosure of all of the facts must be made" and "the *res gestae* must be represented as they actually are." *Lamm v. Burrell*, *supra*; *Johnson v. Glenn*, 40 Md. 200; *Tifel v. Jenkins*, 95 Md. 668; *Davidson v. Baltimore*, 96 Md. 513; *Baker v. Baker*, 108 Md. 274.

Disregarding the fact that the bill asks for an injunction, we fail to see that it states ground for any equitable relief at all. The appellant contends that under its allegations she is entitled to have a resulting trust declared in her favor in the leasehold purchased by the appellees although that is not the specific relief prayed for in the bill.

In *Keller v. Kunkel*, 46 Md. 565, on which the appellant specially relied we said: "The Court below very correctly defined a resulting trust to be that 'which arises where one person buys an estate and pays the purchase money, but takes the deed in the name of another person, then a trust results, by construction in favor of the person who pays the money. The same definition is substantially given in *Hays v. Hollis*, 8 Gill, 357, 1 Md. Chy. 479; *McElderry v. Shipley*, 2 Md. 36-7." "No trust will result unless the person advance the money in the character of a purchaser, for if A. discharge the purchase money by way of loan to B., no trust is raised in favor of A., who is merely the creditor of B." *Lewin on Trusts*, 178.

There is no allegation in the present bill that the plaintiff purchased the property in question and directed it to be put in the names of the defendants. The allegation is that the defendants "secured" \$1,000 from the plaintiff for the purpose of purchasing the property and that although it was purchased in the names of the defendants she believed when she "turned over" the money to them and until recently has continued to believe that it was mutually agreed and understood between the defendants and her that she was entitled to an

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equitable interest in the property and that she in fact has such an interest to the amount and extent of her \$1,000 invested therein. To that is added the allegation, inconsistent with the theory that the purchase was for her account, that the defendants agreed that she should receive certain and regular interest instalments on her investment but that they have failed and refused to pay the interest or any of it.

The circumstances under which the money was "turned over" by her to the defendants are not stated. She simply states her *belief* that it was understood that she was entitled to an equitable interest in the property, a mere matter of opinion as to her equitable status. The only agreement or understanding between the parties that the bill alleges as a fact is that the plaintiff was to be paid *interest* in regular instalments, presumably by the defendants as it is further stated that they have failed and refused to pay the interest. Although the bill avers that the defendants secured the money from her "for the purpose of purchasing the leasehold property" and that they used it in making the purchase, it neither says nor intimates that the purchase was to be made for her account or that even she regarded herself as the purchaser. If we were to indulge in inferences, the facts stated in the bill indicate more strongly that the plaintiff lent the money to the defendants to enable them to purchase the property, believing that in so doing she would have an equitable lien on the property for the repayment of her loan and interest thereon.

The other set of allegations in the bill, that the plaintiff was an aged German uneducated in the English language and with but little business experience and did not understand "the nature of the transaction in which she was engaged" when she turned over the money and that the defendants took advantage of her ignorance and practiced undue influence on her, is equally insufficient to state a ground of relief, as it does not state the circumstances of *the transaction* referred to between her and the defendants or that it was conducted in the English language, and totally fails to

state the acts or conduct of the defendants which constituted the alleged taking advantage of or using undue influence upon her.

"The rule is well established," says Mr. Pomeroy (*Eq. Jur.*, sec. 843), "that a simple mistake by a party as to the legal effect of an agreement which he executes or as to the legal result of an act which he performs, is no ground for either defensive or affirmative relief. If there were no elements of fraud, concealment, misrepresentation, undue influence, violation of confidence reposed, or other inequitable conduct in the transaction, the party who knew or had an opportunity to know the contents of an agreement or other instrument, cannot defeat its performance or obtain its cancellation because he mistook the legal meaning and effect of the whole or any of its provisions." See to same effect 1 *Story Eq. Jur.*, sec. 138; *Gebb v. Rose*, 40 Md. 287.

It follows from what we have said that the decree appealed from must be affirmed.

Decree affirmed with costs.

BESSIE G. EARECKSON ET AL. vs. JOHN G. ROGERS.

Estoppel of Mortgagee to Claim Interest on Mortgage from Purchaser of Equity of Redemption—Right of Assignee to Benefit of Estoppel.

When a person makes a statement to another which induces the latter to refrain from demanding indemnity from a third party, who was bound to furnish the same, the person making such statement is estopped from afterwards enforcing a claim against the person relying upon the statement who would have been protected against it by the indemnity.

Md.]

Opinion of the Court.

Property was conveyed by the mortgagor to A. upon the understanding that it would only be liable for interest on the mortgage from the date of the conveyance. The mortgagor gave to the mortgagee his promissory note for the amount of interest unpaid at the time of this transfer. After the transfer A. paid interest on the mortgage, and subsequently also the balance due on the purchase money to the mortgagor. The mortgagee had informed A. that a sum was due for unpaid interest, but afterwards and before A. paid all of the purchase money, the mortgagee told him that the matter had been adjusted. *Held*, that although the acceptance by the mortgagee of the promissory note for the interest was not a payment thereof, and he did not intend to relinquish the lien of the mortgage as to the interest, yet since his conduct induced A. to pay for the property, supposing that the overdue interest was not a lien on it, the mortgagee is now estopped to enforce payment of the same as a lien under the mortgage.

When the purchaser of property subject to a mortgage is entitled to the benefit of an estoppel against the mortgagee, that estoppel operates also in favor of the person to whom he conveys the property.

Decided January 14th, 1910.

Appeal from the Circuit Court for Howard County (BRASHEARS, J.).

The cause was argued before BOYD, C. J., PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

Albert C. Ritchie (with whom were *Stuart S. Janney* and *R. Contee Rose* on the brief), for the appellants.

John G. Rogers, appellee, submitted the cause on his brief.

PEARCE, J., delivered the opinion of the Court.

The original bill in this case was filed by Mrs. Bessie G. Eareckson and her husband, Dr. Wm. R. Eareckson against

Judge John G. Rogers, alleging that he was the holder of a mortgage for the principal sum of \$2,000, upon a parcel of land in Elkridge, Howard County, owned by Mrs. Eareckson, which mortgage the plaintiffs were ready and desirous to pay, but that a dispute had arisen between the parties as to the amount of interest due and payable on said mortgage, the plaintiffs claiming that all interest had been paid up to October 1st, 1907, and there remains due the principal sum, with interest from October 1st, 1907, while the defendant claims, there is due in addition to the amount admitted by the plaintiffs, the sum of \$310 for interest in arrears on said mortgage as of July 23, 1906, with interest from that date, represented by a note of Judge I. Thomas Jones to Judge John G. Rogers, payable January 23, 1907.

The prayer of this bill was that an account might be taken under the direction of the Court, of the amount of interest due on said mortgage, and for such further relief as the case should require.

The history of the transactions which led to this dispute as gathered from the proceedings, need to be given somewhat in detail, in order to a proper understanding of the merits of the controversy.

The mortgaged premises were formerly owned by the late Judge Jones, who on October 1st, 1881, mortgaged the same to Judge Rogers to secure a loan of \$2,000, payable six years after date, with interest in the meantime semi-annually at six per cent. per annum. The principal debt has never been paid, and the only question is as to the amount of interest unpaid, and collectible *in virtue of the lien of said mortgage*. Mrs. Eareckson was a daughter of Judge Jones, and on January 11th, 1896, he made a written agreement with Dr. Eareckson for the sale to him of said parcel of land at a price, and upon terms, therein stated, but which it is not important to set out here. This agreement does not mention the Rogers mortgage, but Dr. Eareckson knew of its existence and bought subject to the principal of said mortgage with interest from the time possession was taken by him, up to which time Judge

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Jones was to pay the interest on the mortgage. On October 18th, 1899, Dr. Eareckson entered into possession of the property, having paid up to that date \$3,600 of the purchase money to Judge Jones, but leaving due and unpaid exclusive of the principal of said mortgage, with interest from that date, and a ground rent of \$72 per annum, since redeemed by Dr. Eareckson, the sum of \$3,200.

The interest on said mortgage from October 1, 1899, to October 1, 1900, was paid by Dr. Eareckson to Judge Jones and by him was to be paid to Judge Rogers. Whether it was so paid does not appear from the record. It does appear however that the interest accruing on this mortgage from April 1st, 1901, to October 1st, 1907, was paid by Dr. Eareckson by his checks to Judge Rogers, and that a check for the semi-annual interest due April 1st, 1908, was sent to Judge Rogers by Dr. Eareckson May 16th, 1908, and was returned by him, he refusing to accept the same unless the note of \$310 already mentioned was also paid, which Dr. Eareckson refused to pay.

On October 2nd, 1903, Dr. Eareckson having completed his payments, Judge and Mrs. Jones conveyed the property to him, subject to the ground rent and mortgage heretofore mentioned, and this deed was recorded October 5th, 1903. On May 15th, 1907, Dr. Eareckson having then redeemed the ground rent, conveyed the property to his wife Mrs. Eareckson, subject to said mortgage.

Dr. Eareckson testified that he never knew or heard of any claim by Judge Rogers for any interest in arrear on this mortgage until May, 1902, when he received from Judge Rogers a receipt for the interest due April 1st, 1902, upon which was written below the signature these words: "But Doctor, what about the other money due me?" This receipt together with all other receipts for interest paid by him to Judge Rogers, and with all the checks therefor and all other letters and papers relating to this matter were delivered by Dr. Eareckson to his counsel, Mr. R. Contee Rose, and were totally destroyed by a fire in his office January 31, 1909.

He testified that on receipt of that paper he saw Judge Jones in relation to the matter and in consequence of what he told him he saw Judge Rogers shortly after at Relay Station in June, 1902, and asked him what he had done about the claim, and he replied: "That is all right." That he explained to Judge Rogers that he had not then taken his deed, and asked him if it would be all right, and he replied "certainly," his exact words. He also testified that after that he continued to pay Judge Rogers the semi-annual interest on this mortgage up to October 1, 1907, and never heard anything of the demand now made until the check for the interest due April 1, 1908, was returned to him, and that if he had known in June, 1902, when he had the conversation above mentioned with Judge Rogers that there was any claim for interest in arrear on the mortgage or any lien on that property he would not have settled with Judge Jones and taken his deed without settling the claim of Judge Rogers. He also testified that the various receipts of Judge Rogers for interest were all or generally expressed to be "in full for interest" up to their respective dates. Mr. Rose testified that he had carefully examined these receipts while in his possession before the fire, and confirmed Dr. Eareckson as to the receipts being generally "in full," and he was positive as to the receipt for the interest due April 1st, 1902.

Judge Rogers testified in chief that he knew nothing of the conveyance or sale of the property by Judge Jones to Dr. Eareckson until after the deed was recorded, when he examined the Land Record Index, and that there was then in arrears for interest on this mortgage three years interest at six per cent. per annum or \$360, and that before Judge Jones gave him his note therefor, he had written Dr. Eareckson calling his attention to the fact that this was overdue interest, and asking him what he intended to do about it. He also testified in chief that after writing Dr. Eareckson he saw him at Ellicott City, instead of Relay and Dr. Eareckson asked him what he had done about that overdue interest and that he replied: "That's all right, or words of similar import;"

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that he afterwards saw him at a ball game near St. Dennis in the fall of 1908, and then had quite an extended conversation touching that overdue interest. Dr. Eareckson had already testified that at this ball game Judge Rogers told him that his reason for telling him previously that the matter had been adjusted was because Judge Jones did not wish Dr. Eareckson to know that he owed him anything.

On cross-examination Judge Rogers testified that it was between October, 1903, and January, 1904, that Judge Jones gave him the note of \$360 for overdue interest on the mortgage, and that he thought it was for 1900, 1901 and 1902; that Judge Jones made no question about giving the note, but asked him not to say anything further to Dr. Eareckson about it. He also testified that he never gave Dr. Eareckson any receipt for interest expressed to be "in full to date," and that he never was asked by Dr. Eareckson if it was right to take a deed from Judge Jones, and never replied "why, certainly," and that he never knew Dr. Eareckson was interested in the property until after the deed was recorded, and never received any check from him prior to the recording in October, 1903, although it appears from the check stubs of Dr. Eareckson in the record that four payments of interest on this mortgage from October, 1900, to October, 1902, were made by Dr. Eareckson's checks to the order of Judge Rogers, which checks Dr. Eareckson testified were indorsed by Judge Rogers, and were by him turned over to his counsel Mr. Rose, and were destroyed in the fire before mentioned. Both Mr. Rose and Mr. White also testified that they had examined these checks, and that they purported to bear the indorsement of Judge Rogers, from all of which it would seem most probable that Judge Rogers' recollection is at fault in this respect.

Judge Jones died in January, 1907, having made some small payments on the note for \$360, and renewing it from time to time, the last renewal being the note for \$310 already described.

After filing the original bill, the plaintiffs, on January 26th, 1909, filed a petition in that cause, stating that the de-

defendant, notwithstanding the pendency of that proceeding, had advertised the mortgaged premises for sale under a power of sale thereon, and the plaintiffs prayed for and obtained an injunction restraining the sale until an account should be taken as prayed in the original bill; and still later, on February 8th, 1909, the plaintiffs, with leave of the Court, filed an amended bill, praying in addition to the taking of an account for a full and complete discovery by the defendant of the character of the claim for interest in arrears, and when and how the same arose, and of all the circumstances attending it, and also for the redemption and release of said mortgage upon payment of the amount found to be due thereon.

The defendant answered the amended bill, under oath, fully and particularly. The usual replication was filed, and testimony was taken from which we have extracted the material part as hereinbefore recited, and we here transcribe in full that part of the answer which makes the discovery prayed.

“And this defendant having fully answered each and every paragraph of said bill of complaint, says further “by way of answering and replying to, and making a discovery of, the indebtedness claimed by him, viz, that in 1881 this defendant, being upon close and intimate and enduring friendship with the late Judge I. Thomas Jones, loaned him, the said I. Thomas Jones, upon leasehold property in Howard County, for the period of five years the sum of two thousand dollars, and received from him, one principal promissory note for the period of five years, and ten interest notes, for sixty dollars each payable at regular intervals of six months; that the mortgagor continued to pay the interest upon the same (after all of the said interest notes were paid), until about the year nineteen hundred; that not desiring to annoy said mortgagor and feeling that his loan was perfectly secure, this defendant allowed the same to run on, until having seen, or being otherwise advised, that the said property had been transferred to William R. Eareckson, this defendant wrote to said William R. Eareckson, advising him that said amount of interest was in arrears and unpaid; that said William R. Eareckson did

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not reply, but Judge I. Thomas Jones requested this defendant not to say anything more to said William R. Eareckson; that about October, 1903, this defendant again demanded payment of said interest, three hundred and sixty dollars, and said Judge Jones said he would give this defendant his, the said Jones' note for said amount of three hundred and sixty dollars, for six months and would pay the same gradually; that said note was regularly renewed from time to time until the death of Judge Jones which occurred in January, 1907, leaving said note unpaid and a balance of three hundred and nineteen dollars still due and owing thereon, which with interest is still due and owing this defendant as interest on said mortgage; that this defendant denies most strenuously, that he ever intended, or said to anyone, and especially, to William R. Eareckson, that this defendant had taken Judge Jones' note in full payment of said interest, or in lieu of his mortgage lien. That this defendant was asked by said Wm R. Eareckson, on the platform of the railroad station at Ellicott City, whether this matter had been fixed, and this defendant replied "yes," and nothing more; on the contrary, this defendant avers that it must appear to any ordinary mind, that a mortgagee would scarcely release a mortgage lien and take the personal note of a party who had just sold all that he possessed; on the contrary, the taking of said note was for the mutual convenience of both parties, this defendant needed his money and the said Judge Jones was willing and anxious to accommodate him. And your defendant alleges that this is a plain and full explanation of the whole transaction between the parties concerned, and reiterates, most positively, that he never intended to relinquish his mortgage lien, and insists that the same is valid and subsisting, the said mortgage and note for accrued interest, being still unpaid."

The question of estoppel of the defendant by conduct, was not considered either in the appellees brief on which the case was submitted on his part, nor in the opinion of the learned judge below who by his decree dismissed the original and

amended bill, which carried with it the dissolution of the injunction.

The question of estoppel however is the vital question, and the only one which we think it necessary to consider, without intimating any difference of opinion on our part, as to the legal questions considered and determined in the opinion of the lower Court, and in considering this question it will be assumed that the acceptance of Judge Jones' note by Judge Rogers was not in law payment of the interest represented by it, and that Judge Rogers did not intend to relinquish the lien of his mortgage as to that note. But it does not follow that he may not be precluded by what he said and did, from asserting such a lien.

Dr. Eareckson was a competent witness in the case under section 3 of Article 35 of the Code of Public General Laws, and the fact that his agreement of purchase with Judge Jones only required him to assume the interest on this mortgage from October, 1899, when he took possession of the property, and that Judge Jones was to pay it up to that time, and had assured him, it had been paid and adjusted, was a material fact influencing the conduct of Dr. Eareckson, and therefore within the exception to the rule against hearsay evidence as stated in 1 *Greenleaf on Evidence*, sec. 123, where the fact that the declaration was made, and not its truth or falsity, is the point in question. Nor could this evidence be excluded as altering or varying the terms of the written agreement, since it clearly explained what the agreement left in obscurity. Under the agreement with Judge Jones, Dr. Eareckson was entitled to indemnity against this back interest, and when he applied to Judge Rogers for information in regard to it, whether the date of that application was as recollected by either of the parties, he was entitled to know then that Judge Rogers did not intend to release the lien he claimed, and did intend to enforce it against the property of Dr. Eareckson, if Judge Jones failed to perform his contract with Dr. Eareckson. If he had not then settled with Judge Jones, he could have protected himself by withholding that amount from

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Judge Jones; and if he had then settled with Judge Jones, he would then have had over three years before the death of Judge Jones in which to have secured the indemnity to which he was entitled, and no one who knew Judge Jones can doubt that he would have protected Dr. Eareckson the moment he knew he needed protection. The fatal mistake made by Judge Rogers was in yielding to the natural and creditable influence of his close friendship with Judge Jones and giving him his promise not to say anything more to Dr. Eareckson about it, and in keeping this promise until after Judge Jones' death, thereby misleading Dr. Eareckson until it was too late for him to secure protection. The keeping of that promise did credit to Judge Rogers' heart, but it was his undoing in the enforcement of this claim against this property. The principles of the law of estoppel are too well established to require either elaborate statement or extended citation of authorities. *Alexander v. Walter*, 8 Gill, 251; *Carmine v. Bowen*, 104 Md. 204. In the latter case, JUDGE McSHERRY said, citing 16 *Cyc.* 681. "Silence is a species of conduct and constitutes an implied representation of the existence of the state of facts in question, and the estoppel is accordingly a species of estoppel by misrepresentation. Where a person with actual or constructive knowledge of the facts, induces another by his words or conduct to believe that he acquiesces in or ratifies a transaction, or that he will offer no opposition to it, and that other, in reliance on such belief, alters his position, such person is estopped from repudiating the transaction to the other's prejudice."

In *Continental Bank v. Bank of Commonwealth*, 50 N. Y. 575, approved in *Hambleton v. Central Ohio R. R.*, 44 Md. 562, the Court said: "It is not necessary that a party should act affirmatively upon a declaration to claim an estoppel. If he has acted not upon it, but has means in his power to retrieve his position, and relying upon the statement, and in consequence of it, he refrains from using these means, his claim will be upheld." The same principle, touching the right of indemnity, was laid down in *Knight v. Wiffen*, L.

R. 5th Q. B. 660, where Mr. Justice Blackburn held that the question was, not whether he would certainly or probably have secured indemnity, but whether he had a *right* to demand it, and had been deprived of that right by the conduct of the defendant on which he relied. And in *Andrews v. Clark*, 72 Md. 436, JUDGE ALVEY quoted with approval *Bank v. Morgan*, 117 U. S. 96, in which the Court said that where a duty was cast upon a person, which he neglects or omits to discharge, "whereby another is misled in the very transaction to which the duty relates, he will not be permitted to the injury of the one misled, to question the construction rationally placed upon his conduct by the latter." Mrs. Eareckson was in privity of estate with Dr. Eareckson and the estoppel therefore operates in her favor. *Cecil v. Cecil*, 19 Md. 72; *Jones v. Rose*, 96 Md. 483.

It follows from what we have said that the decree of the Court below should be reversed, and the cause be remanded for the passage of a decree requiring the defendant to release the mortgage upon payment by Mrs. Eareckson within some reasonable time to be fixed by the decree of the principal sum specified in said mortgage together with interest thereon from October 1st, 1907, the date up to which the interest had been paid by Dr. Eareckson.

*Decree reversed and cause remanded for a
decree in conformity with this opinion.
The costs above and below to be paid by
the appellee.*

Md.]

Syllabus.

CAROLINE L. STARR vs. THE MINISTER AND
TRUSTEES OF THE STARR METHODIST
PROTESTANT CHURCH.

*Merger of Leasehold in After-Acquired Fee Simple Estate—
Executory Devise—Rule Against Perpetuities—Void
Limitation Over in Conditional Devise to Church—
Religious Societies—Power to Sell Property.*

When the reversion in fee of a parcel of land is devised to, or vests in, the tenant for years of the land, holding in the same right, and there is no intervening estate, the term of years is merged in the inheritance, and the lease, with its covenants, ceases to exist.

A limitation after a fee cannot take effect as a remainder, but may be good as an executory devise.

An executory devise to be valid must take effect upon a contingency or event that must happen within the life or lives of those in being at the death of the testator and twenty-one years thereafter, and if the contingency or event may not happen within that time, the limitation is bad, although the event does in fact occur within that time.

A devise of property to a corporation to be held by it until a certain event occurs, when there is a limitation over, is in violation of the Rule against Perpetuities, if that event may not happen within the existence of a life or lives in being and twenty-one years thereafter, and in such case the devisee takes an absolute fee in the property.

S. leased a lot of ground to a church corporation upon the condition that it and the church building erected thereon should be used for the purposes of a congregation under the control of a certain conference; that no musical instruments should ever be used in worship; that the sexes should be separated in seating, etc. The lease provided for a re-entry and its termination by the lessor or assigns upon a breach of any of the conditions therein. The charter of the church corporation provided that it should hold the property about

to be demised to it upon these same conditions, and that the trustees should have no power to mortgage it. Afterwards S. died leaving a will, by which he devised to the church the yearly rent reserved by the lease, to be held during all such time as may elapse before the church authorities shall admit any musical instrument in the church services, or shall hold any fair or festival, etc., "when and upon the happening of any one of these contingencies," the said ground rent should fall in the residuum of the testator's estate. The church corporation filed the bill in this case asking for a decree directing a sale of the land, since the locality had ceased to be a residential district, and that the proceeds be used in the erection of a church elsewhere to be held on the terms specified in the lease and the will. *Held*, that under the lease the church took the property in its own right, and not as trustees; that this leasehold estate was conditional and liable to be defeated by the re-entry of the lessor or his heirs upon the failure to comply with the conditions.

Held, further, that by the devise to the church of the reversion in the lot, the leasehold interest was merged and extinguished, and thereafter the church held the property in fee under the will until the church authorities did any of the things specified in the will as affecting the duration of the estate.

Held, further, that since the limitation over of the property to the residuary devisees by way of executory devise was to take effect when the church authorities did any one of these specified things, and since these things might not be done within the period covered by a life in being at the death of the testator and twenty-one years thereafter, this limitation is void because in conflict with the Rule against Perpetuities.

Held, further, that since the limitation over is void because repugnant to law, the church took an absolute fee simple estate discharged therefrom.

The provision in the charter of a church corporation that it should hold certain leasehold property about to be demised to it on certain conditions is not applicable when the church afterwards acquires the fee in the property.

Md.]

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A provision in the charter of a church corporation that it shall not have power to mortgage its property does not operate to prevent a sale of the property in case it should become necessary to sell in the interest of the church.

The rule that words in a grant or devise indicating the use to which the property conveyed is to be applied do not of themselves create a condition, is applicable in the construction of the charter of a church, in relation to a statement of the purposes for which property given to it shall be used.

Decided January 12th, 1910.

Appeal from the Circuit Court of Baltimore City (HEUSLER, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE and THOMAS, JJ.

Covington D. Barnitz and Frederick W. Story, for the appellant.

Bernard Carter and Alonzo L. Miles, for the appellee.

THOMAS, J., delivered the opinion of the Court.

In 1864 Wesley Starr and Phillipa Starr, his wife, of Baltimore City leased and demised to the Starr Methodist Protestant Church in Baltimore City a lot of ground, with the improvements thereon, on the corner of Poppleton and Lemon streets, in said city, for the term of ninety-nine years, renewable forever, subject to the payment of the yearly rent of two hundred and forty dollars, and the following provision: "Provided, however, and these presents are on these express and unalterable conditions, that the above-described lot of ground, with the house of worship erected and in process of completion thereon, shall be held by the said lessees, their successors and assigns for the use of the congregation that shall from time to time worship in the said house or church in connection with the annual Conference of the

Maryland District of the Methodist Protestant Church; so, however and under all circumstances, that the seats in the said church shall be and remain forever free; that the congregation in occupying the said church or any church edifice hereafter to stand on said ground shall observe the old Methodist usage of a separation of the sexes in seating; that in public worship the singing shall be conducted in the old-fashioned way of lining the hymns; that there shall be no organ or other kind of musical instrument employed or used during divine worship in connection with the singing in said church; the trustees to have no power to raise money for completing the church, nor for any other purpose, by mortgage of the property and premises, or to incur any debt for such or any other purpose, to bind the property or thereby subject the same to a sale and removal of the restrictions herein provided for. That the church, in addition, is always to remain under the stationing authority of the said conference, and is to receive such minister or ministers, from time to time, as shall be duly appointed to or for it, pursuant to the Constitution and Discipline of the Methodist Protestant Church, so as to perpetuate an efficient itinerancy, without power or authority to assume an independent relation to said annual conference." The lease further provided for a re-entry and termination of the lease by the lessor, his heirs or assigns, upon the breach or non-performance by the lessees or their assigns of any of the covenants or conditions in the lease.

On the day preceding the execution of the lease, that is to say, on the 17th day of May, 1864, the lessee, the minister and trustees of the Starr Methodist Protestant Church in Baltimore City, was duly incorporated under the general corporation laws of the State, relating to religious corporations, and Article 10 of its Charter is as follows: "The property and premises at the southwest corner of Poppleton and Lemon streets, in the City of Baltimore, about to be demised to this corporation by Wesley Starr and wife, shall be held by said trustees for the use of the congregation that shall from time to time worship in the house or church erected on said lot of

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ground, in connection with the annual conference of the Maryland District of the Methodist Protestant Church, so however and under all circumstances that *the seats* in the said church *shall be* and remain *forever free*; that the congregation, in occupying the said church or any church edifice hereafter to stand on said ground, shall observe the old Methodist usage of a separation of the sexes in seating; that in public worship the singing shall be conducted in the old-fashioned way of lining the hymns; that there shall be no organ or other kind of musical instrument employed or used during divine worship in connection with the singing in said church. The trustees to have no power to raise money for completing the church, nor for any other purpose by mortgage of the property and premises, or to incur any debt for such or any other purpose to bind the property or thereby subject the same to a sale and removal of the restriction herein provided for; that the church, in addition, is always to remain under the stationing authority of the said conference, and is to receive such minister or ministers from time to time as shall be duly appointed to or for it pursuant to the Constitution and Discipline of the Methodist Protestant Church, so as to perpetuate an efficient itinerancy, without power or authority to assume an independent relation to said annual conference."

In 1866 Mr. Starr died, leaving a will by the second paragraph of which he gives to his daughter-in-law, Mrs. Laura Starr, for "such time only as she shall remain the widow of Wm. M. Starr, deceased," the yearly rent reserved in the said lease to the Starr Methodist Protestant Church, and the third paragraph contains the following provision: "I give and devise, at my death, unto the Minister and Trustees of the Starr Methodist Protestant Church in Baltimore City, as a kind of endowment, the rents, profits and yearly income of the wharf opposite the lot on Light street, in said city, purchased by me on the 1st day of January, 1842, of John H. B. Latrobe, trustee and others; and at the death or marriage of my daughter-in-law, Mrs. Laura Starr, whichever shall first

occur, the yearly rent of two hundred and forty dollars reserved in the said lease from me to them of May last; to be held and enjoyed by the said church, for and during all such time as may elapse before the corporate authorities, official members or membership of the said church, shall admit any musical instrument, as distinguished from the human voice, into the Sabbath School, singing choir, or choir rehearsals, or singing schools of said church, held either on the church premises or elsewhere, or shall attempt—I trust they never will—to raise money, by the holding now somewhat fashionable—either in the church, or Sabbath School room or elsewhere, of any fair, festival or concert of instrumental music; or by the delivery of any irreligious or political lecture, or the still more demoralizing and sinful mode, should the churches ever so far degenerate as to adopt it, of balls, parties, lotteries, theatrical performances, raffles, or the voting for distinguished individuals; when, and upon the happening of any one of these contingencies, the said wharf property and ground rent shall fall into the residuum of my estate, and be subject to the disposal hereinafter made thereof, and I give and release unto said church all ground rent in arrear under my lease to them, and the accruing rent, computed to the day of my decease.”

The fourth paragraph of the will disposes of “All the rest and residue” of the testator’s estate, and by a codicil to his will he revokes the devise of said ground rent to his daughter-in-law, and declares, “it is my will that the said yearly rent shall vest at once on my decease in the Minister and Trustees of the Starr Methodist Protestant Church in Baltimore City, instead of at the death or marriage of Mrs. Laura Starr, as provided for in the third article of my will, the tenure of the property or conditions of the gift to remain unchanged as prescribed in the will.”

The suit in this case was brought by the “Ministers and Trustees of the Starr Methodist Protestant Church in Baltimore City, the body corporate, against the heirs at law of Mr. Starr, and the bill of complaint, after alleging the exe-

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cution of the lease, and the death of Mr. Starr leaving the last will and testament and codicil to which we have referred, charges that the plaintiff by said will acquired a fee-simple title in said property, "subject to such restrictions as may found in said will," and further alleges that the plaintiff, during the forty-two years since the death of Mr. Starr, "has remained in possession of the property, conducting it as a place of public worship, under the auspices of the Maryland Annual Conference of the Methodist Protestant Church, and has not been disturbed in its possession and use of the same;" that during the lifetime of Mr. Starr, and at the time said lease and will were executed, "the location of said property when said church was being built," at the time of Mr. Starr's death, "was a residential section of Southwest Baltimore, where it was proper that a church should be erected; that during the time which has elapsed since" his death, "the particular locality * * * has become a manufacturing centre and the changes as to the condition of the property and the circumstances attending it and its surroundings, render it impossible for" the plaintiff "to longer hold the property and carry out the intent of the testator," and that "it is absolutely necessary, and would be for the benefit" of the plaintiff "and of all the parties interested therein, that the property be sold and the proceeds invested in the purchase of another site and the erection of a church thereon, so that the will of the testator may be enforced." The prayer of the bill is for a decree authorizing a sale of the property and appointing a trustee to make the sale and to invest the proceeds under the order of the Court, and for general relief.

Four of the defendants, who allege that "they have an interest in the residuum of the estate" of the testator, and are "entitled to share therein," answered the bill of complaint, denying that the plaintiff acquired by the will a fee-simple estate in the property, and that it is necessary and would be for the best interest of the plaintiff and all parties interested "that said property be sold and the proceeds invested in the purchase of another site and the erection of a church there-

on" and averring "that under its charter the plaintiff is absolutely without power to sell" the property.

It is stated by counsel for the appellee in their brief that two of the other defendants filed answers denying the right of the plaintiff to the relief sought, and that the other twelve defendants answered "saying that they thought that the property should be sold, and the proceeds invested in the purchase of another site in a more suitable neighborhood, and the erection of another church to be known as 'Starr Church;'" adding that the said sale should not be decreed until plaintiff shows, to the satisfaction of the Court, its ability to purchase another site and erect thereon another edifice to be used as a church and called the 'Starr Church,' " but these answers are not in the record in this Court.

The testimony was taken in open Court, and the Court below passed a decree, reciting that it appeared "that it would be for the best interest of the plaintiff and all other persons interested in the church work, that the said lot of ground * * * should be sold," etc., ordering a sale of the property and appointing a trustee to make the sale and further ordering "that the proceeds arising from the sale of said property shall be applied to the purchase of another lot of ground to be selected by the board of trustees of the plaintiff corporation, and the erection thereon of a suitable church building for the carrying on of the work and the accomplishment of the purposes designed by the said Wesley Starr, provided, however, that no sale reported by the said trustees shall be ratified until and unless the plaintiff corporation shall have furnished in this case to the Court satisfactory evidence that it can provide, in addition to the proceeds arising from the sale of the property, an amount of money, if necessary, which when added to the net proceeds of said sale, will be sufficient for the securing of a site and the erection thereon of a suitable church building for the carrying on of the work and the accomplishment of the purposes designed by the said Wesley Starr; and provided further that the property so to be acquired by the plaintiff corporation shall be held as the same estate which it

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now has in the property hereby decreed to be sold; and the said property so to be acquired by the plaintiff corporation shall be subject to any conditions and limitations which may now be in force, if any, in respect to the property hereby decreed to be sold," and from that decree only one of the defendants has appealed.

From the foregoing statement of the case, it is apparent that the primary inquiry is as to the character of the plaintiff's present estate in the property. By the lease executed in 1864, Mr. Starr conveyed to the Minister and Trustees of the Starr Methodist Protestant Church in Baltimore City, the body corporate, a leasehold interest in the property to be used for the purposes for which the church was incorporated. He did not thereby create a trust. The gift was to the church in its corporate name for its own use, and no trust or other use was contemplated or intended by the lessor. The plaintiff, therefore, held the property under the lease in its own right and for its own use, and not as trustee. *Woman's Foreign Miss. Society v. Mitchell*, 93 Md. 199; *Erhart v. Baltimore Monthly Meeting*, 93 Md. 669; *Doan v. Ascension Parish*, 103 Md. 662.

The estate conveyed by the lease was a conditional estate, and was liable to be destroyed by a failure of the lessee to comply with the conditions of the demise and a re-entry and termination of the lease by the lessor, his heirs or assigns. The reversion or estate of the lessor, could have been conveyed or devised by him, and would have descended to his heirs at law, if he had died intestate, with the benefit of the conditions in the lease. But when the reversion is conveyed, devised or descends to the lessee, the estate of the latter, if held in the same right, and there is no intervening estate, merges in the reversion and is extinguished.

Blackstone says: "If there be a tenant for years, and the reversion in fee-simple descends or is purchased by him, the term of years is merged in the inheritance, and shall never exist any more" (2 *Blck.*, star page 177). And CHANCELLOR KENT says: "There would be an absolute incompatibility

in a person filling, at the same time, the characters of tenant and reversioner in one and the same estate; and hence the reasonableness, and even necessity, of the doctrine of merger. The estate in which the merger takes place is not enlarged by the accession of the preceding estate; and the greater and only subsisting estate continues after the merger, precisely of the same quantity and extent of ownership as it was before the accession of the estate which is merged, and the lesser estate is extinguished." 4 *Kent Com.*, star pages 99-100. In 24 *Cyc.* 1342, it is said that: "Where the lessee of land becomes the owner thereof in fee, the lease is terminated, and the lesser estate is merged in the greater. This rule is held to be of the same general application without regard to whether the tenant acquired title by a voluntary deed of the landlord, by descent, devise, purchase at execution or judicial sale, or by mesne conveyances." The same rule is recognized in 1 *Washburn R. Prop.*, sec. 740 (6th ed.); 18 *Am. & Eng. Ency. of Law*, 353 (2nd ed.); 2 *Pomeroy's Equity*, secs. 786-800; *Wahl v. Barroll et al.*, 8 Gill, 288; *Story v. Ulman*, 88 Md. 244.

The principle that equity does not favor merger and a merger of the lesser in the greater estate will not be allowed when it would be contrary to the intention and against the interest of the party in whom the two estates coincide, has no application to this case, nor have the cases of *Johnson v. Hines*, 61 Md. 122; *McLaughlin v. McLaughlin*, 80 Md. 116, and *Wehrhane v. Safe Deposit Co.*, 89 Md. 179, cited by the appellant. In the first of these cases the Court held that certain judgments were not merged in a mortgage given as collateral security for their payment; in the second, the Court decided that where one tenant in common purchased a life estate in a moiety of the land owned in common, the life estate was not thereby merged, and the purchase did not enure to the benefit of the co-tenants; and in the last case the Court said that an equitable estate does not merge in the legal estate "if it is necessary for the purpose of justice, or to carry out the intent of the donor that they should be

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kept distinct." Here the intention of the testator, clearly expressed in his will and codicil, was that the plaintiff should be relieved of the rent in arrear at the time of his death, and that from and after his death the church should hold and enjoy the property in fee, for its own use, until "the corporate authorities, official members" or members of the church did any of the things mentioned in the third paragraph of his will.

The leasehold interest of the plaintiff having merged in the estate devised to it by the testator, we must then look to the will in order to ascertain the character of that estate. The estate given was intended to last forever, provided the corporate authorities and members of the church continued to observe the conditions mentioned in the will, and upon their failure to do so, it was to pass to those who took under the residuary clause. If, therefore, the limitation over upon the failure of the plaintiff or the members of the church to comply with those conditions, is not, for any reason, void, the plaintiff took a fee in the property, subject to be determined by the happening of the event upon which the limitation was to take effect. A limitation after a fee cannot take effect as a remainder, for a remainder must await the regular determination of the preceding estate on which it rests, and cannot arise in derogation of it, but such a limitation may be good as an executory devise. The reasons for this rule, which is definite and well established, would be interesting to discuss, but it would unnecessarily prolong this opinion to do more than state it, with some of the authorities by which it is fully recognized. 2 *Blackstone*, 164-171; 4 *Kent*, 198-201; 16 *Cyc.* 648-650; 2 *Wash. R. P.*, secs. 972-3; 1 *Jarman on Wills*, 822-825; *Hill v. Hill et al.*, 5 G. & J. 87; *Battle Sq. Church v. Grant et al.*, 3 Gray, 142. *Blackstone* (2 *Blackstone*, 172) says that "An executory devise of lands is such a disposition of them by will, that thereby no estate vests at the death of the devisor, but only on some future contingency." It is said in 4 *Kent*, 264, that "An executory devise is a limitation by will of a future contingent interest in lands, contrary to the

rules of limitations of contingent estates in conveyances at common law" as "when the deviser parts with his whole estate, but, upon some contingency, qualifies the disposition of it, and limits an estate on that contingency." And Mr. Jarman says: "It will be apparent from what has been stated, that every devise to a person in derogation of, or substitution for, a preceding estate in fee-simple is an executory devise." 1 *Jarman on Wills*, 824. See also *Battle Square Church v. Grant*, *supra*; 2 *Wash. R. P.*, sec. 973; *Biscoe v. Biscoe*, 6 G. & J. 202; *Allender v. Sussan*, 33 Md. 11. While the law allows the creation of such future interests or estates, they must not, however, be so limited as to offend the rule against perpetuities, and if they are not to vest within the period fixed by that rule they are void. An executory devise, to be good, must take effect upon a contingency or event that *must* happen within the life or lives of those in being and twenty-one years and a fraction of a year thereafter, and if the contingency or event *may not* happen within that time the limitation is bad, notwithstanding the event does in fact occur within the period allowed by the rule. *Biscoe v. Biscoe*, *supra*; *Graham v. Whitridge*, 99 Md. 274. As by the terms of the devise to appellee the estate was intended to last so long as the officials and members of the church continue to observe the conditions in the will, it is obvious that the contingency upon which it is to determine, and the limitation over is to take effect, may not happen within the prescribed time, and that the executory devise to the persons named in residuary clause of the will is, therefore, void. In the case of *Welsh v. Foster*, 12 Mass. 93, the Court said: "The estate intended to be conveyed to Welsh was not to take effect, or be vested, 'until the mill pond should cease to be used for the purpose of carrying on two millwheels.' It is apparent that this event, if it should ever happen, might be delayed much beyond the utmost period allowed for the vesting of estates on a future contingency. The rule as to springing and shifting uses is the same which is uniformly applied to executory devises; and the reason of the rule applies equally to all of them.

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namely, to prevent the creating of perpetuities or unalienable estates. The event must, in its original limitation, be such that it must either take place, or become impossible to take place, within the space of one or more lives in being, and a little more than twenty-one years afterwards.

"In the case at bar, upon any construction that can be given, consistently with the manifest intent of the parties, it was to create an estate in fee in *Peck*, so long as the mill pond should continue to be used for those purposes, whether that should be a few years, or as many centuries; and afterwards a like estate in *Welsh*.

"It is no answer, to say, that the event which was to vest the estate in *Welsh* might happen, or that it has happened, in a shorter time than what is often allowed under the rule of law before mentioned. It should be such as must happen within such a period. The rights of *Welsh* must be decided by the deed itself, and the state of facts, as they existed at the time when that deed was made. If we could say that he then acquired a right to the land, to be enjoyed on the happening of the event contemplated, there is nothing to prevent the vesting of the estate according to the deed, although the event should not have happened for a century to come."

The rule is that "where a subsequent condition or limitation is void by reason of it being impossible, repugnant or contrary to law, the estate becomes vested in the first taker, discharged of the condition or limitation over, according to the terms in which it was granted or devised; if for life then it takes effect as a life estate; if in fee, then as a fee-simple absolute." *Battle Square Church v. Grant*, 3 Gray, *supra*; 1 *Jarman on Wills*, 826-7; 2 *Blackstone*, 156; *Allender v. Sussan*, *supra*; *Stansbury v. Hubner*, 73 Md. 228.

In the case of *Battle Square Church v. Grant*, the devise was to the present deacons of the church, and their successors, of the mansion house of the testator upon the express condition and limitation "that the minister or eldest minister of said church shall constantly reside and dwell in said house, during such time as he is minister of said church; and in

case the same is not improved for this use only, I then declare this bequest to be void and of no force, and order that said house and land then revert to my estate, and I give the same to my nephew, John Hancock, Esquire, and to his heirs forever." And the Court, after a very full and able discussion of the principles involved and of the authorities by JUDGE BIGELOW, held that the limitation over to John Hancock was too remote and void, and that the deacons of the church, therefore, took an absolute fee-simple title to the property.

In the case at bar the devise to the plaintiff was of the fee in the property, subject to the limitation over in favor of those who took under the residuary clause of the will, in the event the officials or members of the church did the things mentioned in the third paragraph of the will, and as the limitation over is void and cannot take effect, we must hold that the plaintiff took an absolute fee-simple estate in the property.

The only remaining question to be considered is whether under the charter of the appellee a sale of the property is prohibited. Section 302 of Article 23 of the Code of 1904, relating to religious corporations, which is practically the same as section 89 of Article 26 of the Code of 1860, in force at the time the appellee was incorporated, provides that: "The Trustees so elected shall have perpetual succession by their name of incorporation, and be capable in law to purchase, take and hold to them and their successors in fee, or for a less estate, any lands, tenements or hereditaments, rents or annuities, goods or chattels within this State, by the gift, bargain, sale or devise of any person, body politic or corporate capable of making the same, and to use or lease, mortgage or sell and convey the same in such manner as they may judge most conducive to the interest of their respective churches, societies or congregations; provided, that nothing herein shall authorize any sale, mortgage or other disposition of any property held by such corporation under any instrument prohibiting such sale." In view of the authority thus conferred upon a religious corporation to sell and convey property held by it,

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unless such sale is prohibited by the instrument under which it holds the property, if we are to hold that the property in question cannot be sold by the appellee, it must be because of some clear and positive provision in Mr. Starr's will or in its charter. We have already determined that under the terms of the will the appellee holds an absolute fee-simple estate in the property, and there is, therefore, nothing in the will to prevent a sale.

Nor do we find in the charter any clear injunction against the sale of the property. The incorporators, as indicated by the reference in the charter, were dealing with the leasehold interest or estate in the property about to be conveyed to them by Mr. Starr on certain conditions, and the restrictions in Article 10 had reference to *that estate* and the conditions on which it was to be granted. To hold them applicable to the after-acquired fee in the property would be giving them an effect not contemplated by the framers of the articles of incorporation. Moreover, as the law under which the appellee was incorporated expressly authorizes a sale of the property, if in the judgment of the corporate authorities, it would be conducive to the interest of the church to sell it, any qualification of that right in its charter should be strictly construed, and not be extended by construction, so as to include restrictions not within the plain meaning of the terms employed. That words in a grant or devise indicating the use to which the property is to be applied, do not of themselves create a condition, has been repeatedly held by this Court, without encroaching upon the doctrine announced in *Reed v. Stouffer*, 56 Md. 236, cited by the appellant, where the property was conveyed to trustees to be held by them in trust for a certain use. *Newbold v. Glenn*, 67 Md. 491; *Kilpatrick v. Baltimore City*, 81 Md. 195; *Faith v. Bowles*, 86 Md. 18; *Baltimore City v. Day*, 89 Md. 555. The same rule should be applied to the construction of a charter, which, it is claimed, qualifies the use and enjoyment of property devised in fee to the extent of taking away a valuable and important right granted by the law which gave it life. Now the charter

provides that the Trustees shall not have the "power to raise money for the completion of the church, nor for any other purpose by mortgage of the property and premises, or to incur any debt for such or any other purpose to bind the property or thereby subject the same to a sale and removal of the restrictions herein provided for." This provision does not in terms include the right to *sell* the property in case it should become necessary to do so in the interest of the church, and the *only* power denied is the power to impose a lien on the property and thereby subject it to a sale for debt. If the incorporators had intended to take away the power to sell the property *under any and all circumstances* they would have said so in plain terms, and in the absence of some clear expression of such intention, it cannot be inferred from the language used.

We have examined the evidence in the case and think it justifies the allegations of the bill and the conclusion reached by the Court below "that it would be to the best interest of all the parties interested that the property be sold and the proceeds invested in the purchase of another site and the erection of a church thereon."

It follows from what we have said, that the appellee has the right to sell the property and to invest the proceeds of sale as may be deemed best for the use of the church which was the object of Mr. Starr's bounty, but as all of those interested in its welfare, except the appellant, appear to have acquiesced in the decree of the Court below, we will affirm it, and require the appellee to pay the costs in that Court and the costs of this appeal.

Decree affirmed, the appellee to pay the costs in this Court and in the Court below.

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Syllabus.

PRISCILLA J. WHALEN ET AL. vs. THE BALTIMORE
AND OHIO RAILROAD COMPANY.

Covenant by Railway Company to Maintain Siding on Covenantee's Land Not Perpetual—Substantial Compliance.

A contract providing that a railway company shall maintain a station for passengers at a certain place is substantially complied with by the construction and maintenance of a station there for a number of years. Such a contract does not bind the company to keep a station forever at that place.

A railroad company covenanted with a landowner and his assigns to construct and maintain a turnout and siding at a certain point on the land and there take up and set down passengers and freight. The company maintained the siding for nearly sixty years, when the exigencies of its business required a different location of its tracks to be made and the siding was abandoned. In an action for breach of the covenant, *held*, that in view of the fact that the covenant does not provide for the maintenance in perpetuity of the services in question, and of the fact that they were maintained for many years, and in view of the circumstances which caused their abandonment, there has been no breach of the covenant and the plaintiff is not entitled to recover.

Decided January 12th, 1910.

Appeal from the Baltimore City Court (DOBLER, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

Edward M. Hammond, for the appellants.

This Court having decided in *Whalen v. B. & O. R. Co.*, 108 Md. 11, that the said covenants inure to the benefit of the plaintiffs, it is difficult to discover just why the plaintiffs

could be ousted and deprived of their valuable rights thereunder without the violator of those rights being liable in damages.

To say that damages cannot be recovered on a contract because it is against public policy premises the fact that at the time the contract was made, it was wrongful or against public policy. This cannot be argued since that decision.

As the contract as originally entered into could not at that time be avoided as against public policy, then in the changes of time when the railroad seeks to avoid its execution that compensation must be paid before our rights can be so annihilated.

The Supreme Court in *B. & O. v. Voigt*, 176 U. S. 5, said: "It must not be forgotten that the rights of private contract are no small part of the liberty of the citizen, and that the usual and most important function of Courts of justice is rather to maintain and enforce contracts, than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appears that they contravene public right or the public welfare." See also *Printing Co. v. Sampson*, L. R., 19 Eq. 465.

Greenhood on Public Policy lays down as Rule V: "If a contract conform to the public policy of the State when made, a change of public policy will not avoid it." One of the most pronounced illustrations of this principle is where A. sold to B. slaves prior to the adoption of the thirteenth amendment to the Federal Constitution, abolishing slavery. After the adoption thereof the note remained unpaid. A. brought suit thereon. The defense was public policy. It was held that the same was no ground of defense and A. was entitled to recover. *Ibid.* See also *Boyce v. Tabb*, 18 Wall. 546.

The Supreme Court in *Osborne v. Nicholson*, 13 Wall., at page 662, says: "Rights acquired by a deed, will or contract of marriage, or other contract executed according to statutes subsequently repealed subsist afterwards, as they were before, in all respects as if the statutes were still in force. This

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is a principle of universal jurisprudence. It is necessary to the repose and welfare of all communities. A different rule would shake the social fabric to its foundations and let in a flood tide of intolerable evils. It would be contrary to 'the general principles of law and reason' and to one of the most vital ends of government. The doctrines of the repeal of statutes and the destruction of vested rights by implication, are alike unframed in the law * * * The proposition, if carried out in this case, would in effect take away one man's property and give it to another, and the depreciation would be 'without due process of law.' "

And in 9 *Cyc.* 576: "So a change in the law cannot make an agreement illegal which was legal when it was made." See also *Stephens v. Southern Pacific Co.*, 29 L. R. A. 751.

The decision in *B. & S. R. R. Co. v. Compton*, 2 Gill, 20, sustains the right of the appellants to maintain an action at law against the B. & O. Railroad Company as a consequence of its action in abandoning the turnout and siding at Dorsey's run. For after the B. & S. R. R. Co. had constructed its railroad by authority of law through Compton's land, the right of way through which land was condemned for the purposes of the railroad, the railroad company, having been authorized by an Act of Assembly to alter the location of its road, abandoned that part of it which had been made through the plaintiff's land; and Compton brought this action to recover damages therefor. The Court held that although the change of location had been made by authority of the Legislature, this did not exempt the company from liability to the plaintiff for the loss sustained by him by reason of such abandonment.

Where the grantor in consideration of \$25 and of the building of the railway, conveyed to a company, its successors or assigns forever in fee simple, the right of way through his land, and added in the deed the following words: "It is hereby agreed and understood a depot and station is to be located and given to said O. Reeves, on the land or strip above conveyed to be permanently located

for the benefit of said O. Reeves and his assigns, and to be used for the general purposes of the railroad company," the grantee by accepting such deed, entered into a covenant to comply with its terms, and this covenant ran with the land and became obligatory upon any second company which became the purchaser under proper legal direction of all the rights, privileges, franchises and property of the former. *Ga. So. R. R. v. Reeves*, 64 Ga. 492.

"Where the owners of real estate sold a part thereof to a railroad company and in consideration of a sum of money to be paid, and of the covenants in the contract expressed, that the purchaser should restore certain switch connections, it was held in an action at law for the breach of the contract, that the covenant bound the railroad to continue the switch connections, and that the plaintiff was entitled to recover." *P. F. & W. & C. Ry. Co. v. Reno*, 123 Ill. 273. This case was first decided in 123 Ill. 39, in which the plaintiffs asked for a decree of specific performance to compel the railroad company to connect a switch with their main track. The Court refused to grant the relief prayed for in that case, but said that the plaintiffs were entitled to recover in an action at law. See also *Dorsey v. St. Louis, etc., R. R.*, 58 Ill. 67.

Reference is also made to the following cases in support of the same proposition: *Burnett v. Great N. Rly. Co.*, Law Rep. 10 Appeal Cases, 159; *Louisville, etc., Rly. Co. v. Sumner*, 106 Ind. 59; *Watson v. Alleghany R. R. Co.*, 74 Pa. 208; *Schollen v. St. Louis, etc., R. R.*, 101 Mo. App. Rep. 516; *Butler v. Tipton, etc., Co.*, 121 Ga. 817.

In *Texas and P. R. Co. v. Marshall*, 136 U. S. 393, the Court declared against the specific enforcement of a contract to make the City of Marshall the eastern terminus of the railroad, but the Court did emphatically authorize a suit for damages at law against the railroad for the breach of the contract.

Where a deed provided that the grantor, a railroad company, should establish and maintain a station on the land conveyed, the erection of a small building for temporary pur-

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poses until the grantee could build a permanent structure, was not a compliance with the contract and the railroad never having erected a permanent structure it must respond in damages in an action at law. *Ecton v. Lexington Ry. Co.*, 59 S. W. Rep. 864.

Where a railroad covenants to maintain a good crossing, the company is responsible in damages for its breach. *Cincinnati S. Ry. Co. v. Hudson*, 88 Ky. 480.

Where certain parties constructed a lateral railroad over the land of another under an agreement with the owner, wherein it was stipulated that the road should be constructed in a particular manner, and with a turnout for the benefit of the owner of the land; the remedy for a violation of these clauses of the agreement is an action at law to recover damages thereby sustained. *Pusey v. Wright*, 31 Pa. 387.

For a full presentation of the question of the appellants' right to recover at law, see the note in 16 L. R. A. (N. S.) 307, *Taylor v. Florida East Coast Ry.*

The following cases are decisive on the point that a railroad is responsible in damages for the breach of its contract to maintain a siding: *St. Louis R. Co. v. Crandall*, 75 Ark. 89; *Indianapolis R. Co. v. Hood*, 66 Indiana, 580; *Taylor v. Cedar Rapids R. Co.*, 25 Iowa, 371; *New York R. Co. v. Stanley*, 34 N. J. Eq. 55; *Brooklyn Co. v. New York R. Co.*, 80 App. Div. 508; Affirmed in 178 N. Y. 593; *Waterson v. Alleghany R. Co.*, 74 Pa. 208; *Cumberland Valley R. Co. v. Baab*, 9 Watts, 458; *Conger v. N. Y. R. R.*, 120 N. Y. 29; *Willson v. Winchester & P. R. Co.*, 99 Fed. Rep. 642; *Gray v. Chicago, etc., R. Co.*, 189 Ill. 400.

James A. C. Bond and *Francis Neal Parke*, for the appellee.

The question on this record is whether the appellee committed a breach of its covenant when after nearly sixty years of faithful compliance with the terms of its covenant, it became unable to perform them because of a necessary change in the location of its roadbed.

The appellee maintains that the removal of the main stem of its railway from Dorsey's Run is not actionable in law because of either of the following two propositions:

(a) The duration of the covenant was so long as the railroad company should maintain its main stem on the route passing the point known as Dorsey's Run on the land conveyed by Judge Dorsey and wife to the appellee.

(b) The full and faithful discharge of this covenant for almost sixty years was a complete performance in the contemplation of law.

The charter of the Baltimore and Ohio Railroad Company, and its amendments, at the time of the execution of the deed to the company from Thomas B. Dorsey and wife, are the laws subsisting at the date of the deed and so form part of the deed in question, and determine the limitations of the obligations assumed. *St. Mary's Industrial School v. Brown*, 45 Md. 332.

The Court will take judicial notice of the charter of the Baltimore and Ohio Railroad Company, as it is a public statute creating a public corporation. *Baltimore v. B. & O. R. R. Co.*, 6 Gill, 296, 297; 21 Md. 91; *Chesapeake & Ohio Canal Co. v. West. Md. R. R. Co.*, 99 Md. 575; *Miller v. Matthews*, 87 Md. 464; *Bosley v. Susquehanna Canal Co.*, 3 B. 65; and see sec. 2 of Ch. 123, Acts of 1826.

This learned Court has construed the charter of the Baltimore and Ohio Railroad Company and determined that, at the time of the execution of the deed containing the covenant between the parties, the company had the undoubted power to change the location of its main stem. 108 Md. 22.

The law attributes to Thomas B. Dorsey and wife the knowledge that they were dealing with a public service corporation designed to accomplish great and important objects, under a charter which was to be construed with that liberty of interpretation which would best effectuate the designs of its creation and with no power to enter into any engagement which would in any manner interfere with the exercise of its corporate power in the discharge of its public obligations.

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And furthermore the law attributes to Thomas B. Dorsey and wife the knowledge that the Baltimore and Ohio Railroad Company had the power to change the location of its main stem, and could not contract with them to the contrary.

Hence, it is clear from the nature of the transaction and the limitations upon the contractual powers of the Baltimore and Ohio Railroad Company imposed by subsisting law, and the knowledge thereof imputed by law to the contracting parties, that a necessary term of the contract, implied by force of law, was that the covenant should only endure so long as the main stem of the appellee was maintained at Dorsey's Run.

The right of a railroad company to make the necessary improvements contemplated by its charter was intended in a large measure to be exercised for the public good, and it will not be presumed in the absence of clear words that the company intended to barter away that right, and thus disable itself wholly or in part to perform those public functions it has undertaken. *Lilley v. Pittsburg, V. & C. Ry. Co.*, 213 Pa. St. 247.

From the very nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled any longer than the main stem of the Baltimore and Ohio Railroad Company continued to remain on its location at Dorsey's Run, so that when entering into the contract the parties must have contemplated such continued location as the foundation of what was to be done; and hence, in the absence of any express stipulation that the main stem was to be continued forever on the same location, the contract must be subject to the implied condition that the appellee's performance of the contract is limited to the period in which the main stem of the appellee would remain on its location at Dorsey's Run. *Krell v. Henry* (1903), 2 King's Bench Div. (747).

This construction gratifies every requirement of the terms of the contract, and does not conflict with any rule of law or adjudicated cases.

But the position of the appellants obliges the Court to make a new contract. They would write the word "forever" into the covenant and change the words "to construct and maintain, etc." to the totally different words "to construct and maintain forever, etc." This cannot be done. To do so is to disregard the powers of the contracting parties, which are limited to those within the scope and spirit of the charter of the railroad company; to ignore the pregnant circumstances surrounding the covenant and embodied, in part, by the deed itself and to write into the covenant new terms upon which the minds of the contracting parties never met.

Not only does the construction of the appellants do violence to the language of the covenant, but it has been repudiated by the Courts. *Texas and Pacific Railroad Co. v. City of Marshall*, 136 U. S. 393.

The reasons for this construction are well set forth in this quotation from the similar case of *Texas and Pacific Railway Company v. Scott*, (41 U. S. App. 624), 37 L. R. A. 94, 98: "It cannot be true that an agreement on the part of a railway company to establish a station at a particular point is an agreement to keep it there forever. It must be that such an agreement is made subject to the general exigencies of business, the public interests, and to the change, modification and growth of transportation routes, as these may affect the requirements of the railway company's business. The contract having this limitation, we think that the establishment of a railway station and its maintenance to the full extent claimed or expected for thirty-six years is, under all the circumstances, a substantial and sufficient compliance with the terms of the contract relied on here. See also *Western Union Tel. Co. v. Penn.*, 125 Fed. Rep. 71; *Lucas v. Ry. Co.*, 130 Fed. Rep. 438; *Mead v. Ballard*, 7 Wall. 290; *Jessup v. Grand Central R. Co.*, 7 Ontario App. 128.

Apart from the fact that the change from Dorsey's Run of the location of the main stem of the appellee's railroad terminated the existence of the specific condition on which the performance of the covenant depended, we maintain the railroad

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company has fully discharged the covenant by its fulfillment for almost sixty years. *M. & P. R. Co. v. Silver*, 110 Md. 517; *Texas & Pacific R. R. Co. v. City of Marshall*, 136 U. S. 393 (eight years); *Texas & Pac. Ry. Co. v. Scott*, 41 U. S. App. 624, 37 L. R. A. 94, 98 (thirty-six years); *Mead v. Ballard*, 7 Wall. 290; *Jessup v. Grand Central Ry. Co.*, 7 Ont. App. 132 (ten years), reversing 28 *Grant*, Ch. 583; *Jacksonville, Madison, etc., Ry. Co. v. Barbour et al.*, 89 Ind. 375 (thirty-three years); *Wilson v. Winchester & P. R. Co.*, 41 C. C. A. 215, 218, note.

SCHMUCKER, J., delivered the opinion of the Court.

This appeal brings before us for the second time the covenant which constitutes the cause of action in the present controversy. It came here first in a bill for its specific performance in the case of *Whalen v. Baltimore & Ohio Railroad Co.*, reported in 108 Md. 11. We having declined to grant the relief there asked for, the present suit at law was instituted in the Baltimore City Court to recover damages for an alleged breach of the covenant.

The railroad company as defendant below demurred to the declaration and the Court sustained its demurrer whereupon the plaintiffs appealed from the judgment for costs entered on the demurrer.

The declaration alleges that on May 5th, 1848, the railroad company by an indenture, of which profert is made, covenanted for the consideration therein mentioned with Thomas B. Dorsey and his wife their heirs and assigns "to construct and maintain a turnout and siding at Dorsey's Run on the main stem of said railroad, to take up and set down at said siding by the passenger cars of said company all persons going to and from the farm now occupied by the said parties of the first part and to leave at said siding to be unloaded any car in which any article or articles weighing at least three thousand pounds shall be laden for said parties and on which the cost of transportation shall have been paid at the place of lading."

It is further alleged in the declaration that the plaintiffs (appellants) have by mesne conveyances become seized of a large part of the land, owned and seized by the said Dorsey and wife at the time of the execution of the deed of 1848, and are entitled as the assigns of Dorsey and wife to enjoy the benefits of the covenants of that deed.

It is then averred that the railroad company from the year 1848 to the year 1907 has been abiding by and performing the covenants of said deed, in that it has been operating its passenger and freight trains over the right of way the deed described, and constructed and maintained a turnout and siding at Dorsey's Run on the line of its main stem, and took up and set down at the siding by its passenger cars all persons going to and from the said farm and delivered there all freight shipped thereto; but in the year 1907 the railroad company constructed a cut off on its main stem by virtue of which a large part of the right of way over the plaintiffs' land was abandoned, and it discontinued the turnout and siding at Dorsey's Run and refused, and still refuses, to take up and set down at that place by its passenger cars persons going to or from the farm, and that by reason thereof the plaintiff has sustained great damage in the several respects set forth in the declaration. There is no allegation that the railroad company fraudulently made the cut off and change of location in their main stem which resulted in the abandonment of the structures and stopping place at Dorsey's Run, nor was any such contention made at the hearing of the appeal.

In the suit for specific performance in 108 Md. we held, upon the authority of many cases then cited, that the covenant now in question constituted a valid contract binding upon the railroad company when entered into, and at that time capable of being specifically enforced, and that it ran with the land and enured to the benefit of the plaintiff as an assignee of a portion of the land. We declined to grant the specific performance and also the injunction asked for in that case, because, in our opinion, the railroad company had

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the right and power to make the cut off which it did, and the consequent alteration of the line on its main stem, "for the purpose of straightening the lines and reducing its grades and thus improving its service to meet its obligations to the public and also to increase its earning capacity for the benefit of its stockholders." We further said in that connection that, "the very purposes of its creation forbid that it should be tied to the same location forever."

We concluded our opinion in that case by saying: "Whether the plaintiffs are entitled to compensation in damages for the abandonment by the defendant of the turnout and siding and train service, so long maintained by the appellee at that place, this Court is not now called upon to determine but we are all of the opinion that the relief prayed for in the bill of complaint must be denied, and that the appellants must be left to seek redress for any injury which they may have sustained by such abandonment in a Court of law."

Having decided in the equity suit that the covenant was valid and that it enured to the benefit of the present plaintiffs, we are now called upon to consider whether an abandonment of the turnout and siding at this late day, resulting from a lawful change by the railroad company of the line of its main stem, constituted a breach of covenant for which an action at law for damages will lie. The covenant being a written contract its construction is a matter for the Court.

In order to arrive at the real purpose and meaning of the parties to a contract the Court, according to the accepted canons of construction, considers the language employed, the subject-matter and the circumstances under which it was made.

Considering the language used in the covenant before us, it is to be observed, that while it distinctly provides for the construction and maintenance of the turnout and siding on Mr. Dorsey's land and the stopping of the cars at that point it is entirely silent as to the duration of the maintenance of those structures or that service. We cannot yield our assent to the contention of the appellant that the word "main

tain" ordinarily means to maintain indefinitely or forever. Its meaning in that respect depends upon the context in which it appears and the subject-matter to which it relates. There is plainly no specific or positive provision in the covenant touching the duration of the time during which the covenanted acts are to be done or privileges furnished.

In *Texas & Pac. R. R. Co. v. Marshall*, 136 U. S. 393, the Texas & Pacific Railroad Co. had covenanted, in consideration of the donation to it by the town of Marshall of \$300,000 and sixty-six acres of land, to establish its eastern terminus at the City of Marshall and to construct there its main machine shops and car works. In one of the letters by means of which the contract was made the expression "*permanently* establish" the terminus, etc., occurred but in the others the word *permanently* did not appear. The money was paid and the land conveyed to the railroad company and it established its eastern terminus machine shops and car works at Marshall but after having maintained them there for eight years began to remove them to other places. The City of Marshall applied for an injunction to prevent their further removal. The U. S. Circuit Court, to which the application was made, granted the injunction but the case was reversed by the Supreme Court of the United States. In the opinion of the Supreme Court, speaking through JUSTICE MILLER, after alluding to the fact that the railroad company had established its terminus, machine shop and car works at the City of Marshall and maintained them there for eight years, said:

"If, however, the city desired something more than this, if it desired to make sure that these establishments should forever remain within the limits of the City of Marshall and that the railroad company should be bound to keep them there forever, such an extraordinary obligation should have been acknowledged in words which admitted of no controversy. It would have been very easy to have inserted into this contract language which forbade the company from ever removing the terminus of the road to some other point or from ever remov-

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ing or ceasing to use the depot, or the car and machine shops and thus have made the obligation perpetual."

In so far as public railway stations are concerned it was said by us in the recent case of *Md. & Penna. R. R. Co. v. Silver*, 110 Md. 517: "It has been held in a number of well-reasoned cases that the covenant on the part of a railroad company to erect and maintain a flag station for local trains at a certain place on its line, even if originally valid, is fairly complied with by the erection and maintenance of such a station for a period of years, and until the exigencies of its business, the convenience of the public and the welfare of the railroad demand its removal. *Texas v. Scott*, 37 L. R. A. 94; *Mobile v. People*, 132 Ills. 559; *Camp's Case*, 15 L. R. A. N. S. 594; *Jefferson v. Barbour*, 89 Ind. 375."

In the case in 108 Md. we recognized the soundness of the distinction, made in many decisions, between covenants to maintain stations for public convenience and those to establish and maintain sidings, turnouts, crossings and the like for private use merely. We there said that the former class of covenants are generally condemned as against public policy while the latter are to be governed by the circumstances of each particular case. The covenant now under consideration not only stipulates to construct a turnout and siding, on the main stem of the railroad, at Dorsey's farm but also "to take up and set down at said siding by the passenger cars of said company *all persons* going to and from the farm" and also to receive and deliver freight at that point under the conditions therein mentioned. The provision for stopping its passenger cars at the farm for *all persons* going to or from it comes very close to an agreement for establishing a public station of the kind involved in *Silver's Case*, in 110 Md.

In our opinion such a covenant as that, when it contains no stipulation for maintaining the structures or stopping the trains either in perpetuity or during a specified period, should, in view of the well known scope and purpose of a public service corporation like a railway company, be presumed to have been made subject to the exigencies of the

company's further development and needs. As was said in the case of *Texas and Pacific Railway Company v. Scott*, 41 U. S. App. 624: "It cannot be true that an agreement on the part of a railway company to establish a station at a particular point is an agreement to keep it there forever. It must be that such an agreement is made subject to the general exigencies of business, the public interests, and to the change, modification and growth of transportation routes, as these may affect the requirements of the railway company's business. The contract having this limitation, we think that the establishment of a railway station and its maintenance to the full extent claimed or expected for thirty-six years is, under all the circumstances, a substantial and sufficient compliance with the terms of the contract relied on here."

When, in a case like the present one, after the company has maintained the structures and stopping place agreed on for more than fifty-nine years, it becomes necessary or desirable for the promotion of better public service to so alter the location of its road bed as to no longer pass the place mentioned in the covenant, and the change is made in good faith, we think the previous maintenance of the structures and stopping place should be regarded as a substantial performance of the covenant, and be held sufficient to discharge the company from further liability thereunder.

Eight years maintenance of a terminus, shops and car works was held in *Marshall's Case, supra*, to amount to a performance of the covenant.

Seventeen years maintenance of a public station until "the exigencies of business, the convenience of the public and the welfare of the railroad" demanded its removal, was held by us in the recent case of *Md. & Penna. R. R. Co. v. Silver, supra*, to constitute a fair compliance with a covenant to make and maintain a passenger and freight station on a specified lot of land conveyed to it for that purpose.

In the case of *Mead v. Ballard*, 74 U. S. 290, the ancestor of Mead conveyed in 1847 a tract of land in Wisconsin by a deed containing the following language, "said land being con-

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veyed upon the express understanding and condition that the Lawrence Institute of Wisconsin chartered by the Legislature of said territory shall be permanently located on said lands;" and further provided that on the failure of such location being made within a year thereafter the land should, on the repayment of the purchase money, revert to the grantors. The institution was located upon the lands within the specified time and its buildings were erected thereon. About ten years thereafter the buildings burned down and were never rebuilt, but a larger and better set of buildings were erected on an adjoining lot of land. Mead the heir of the grantor thereupon tendered the purchase money and demanded a reconveyance of the land and upon the refusal of his demand brought suit. It was held in that case that when the trustees of the institute by resolution located it on the land and erected its buildings thereon the contract was complied with. It was further held that the use of the word *permanently* in the condition in the deed did not require them to rebuild the burned buildings and that the title to the land was not forfeited by the failure to do so. That case was in part decided upon the fact that by the terms of the deed the institute was to be located on the land within a year and that it therefore meant something that could be done in a year. but it is cited and relied on by the Supreme Court in the *Marshall Case*.

In view then of the absence from the covenant sued on in this case of any stipulation for the maintenance in perpetuity of the structures and service therein contracted for, and also in view of the very long time for which they were in fact maintained, and the nature of the event which caused their ultimate abandonment, we are of the opinion that there was no error in the action of the learned judge below in sustaining the demurrer and we will affirm the judgment appealed from.

Judgment affirmed with costs.

CORRILLA C. SCARLETT ET AL. vs. THOS. H.
ROBINSON ET AL., TRUSTEES.

*Admissions in Equity Cause—Allegations of Bill for Partition
or Sale of Real Estate of Decedent Admitted—Validity of
Decree for Sale upon Admissions Without Testimony—
Marketability of Title—Purchaser of Real
Estate of Decedent Protected from
Liability for His Debts.*

As a general rule, admissions of parties make it unnecessary to prove the facts admitted; and when all of the parties to a cause are competent to bind themselves, their admissions are sufficient to establish the jurisdictional averments of the bill.

Code, Art. 16, sec. 129, authorizes Courts of Equity to decree a partition of land owned in common upon the bill of any concurrent owner, or, if it appear that the lands cannot be divided without loss or injury to the parties interested, the Court may decree a sale for the purpose of dividing the proceeds among them. The bill in this case alleged that certain lands owned by a deceased intestate descended to the plaintiffs and defendants, his only heirs at law, and that a sale of them was necessary for the purpose of partition. The defendants, who, as well as the plaintiffs, were of full age, answered, admitting the allegations of the bill, and a decree was passed directing a sale. No testimony was taken in support of the averments of the bill. Upon exception to the ratification of the sale by the purchaser of part of the land, *held*, that the allegations in the bill were sufficient to give the Court jurisdiction, and that the absence of evidence to support these allegations, which were admitted, does not affect the validity of the decree, and that consequently the circumstance that no testimony was taken to prove such admitted facts is no ground for vacating the sale.

Held, further, that such absence of testimony does not affect the marketability of the title to the land acquired by the purchaser, since, in a case like this, the Court sells only the title

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of the parties to the suit, and even if there had been testimony to show that the parties to the cause were the exclusive owners of the property, the decree would not have been binding upon persons not represented, who did in fact have interests in the property, and there is no allegation that any such interests in the property existed.

Upon exceptions to the ratification of the sale of the real estate of a decedent, it was objected that certain claims against his estate had been filed in the Orphans' Court and would constitute a lien on the real estate in case the personal property was insufficient to pay his debts. *Held*, that this exception is not a ground for vacating the sale, since the order of ratification provided that the entire proceeds should be held by the trustees subject to the future order of the Court, and until after distribution of the personal property of the deceased under the order of the Orphans' Court, and it is conceded in this Court that the time has now expired for creditors to file their claims; that due notice had been published, and that after the payment of all debts exhibited there remained in the hands of the administrator a large balance for distribution to the next of kin.

The point of time after which the heir or devisee may sell the land to a *bona fide* purchaser without incurring the risk of having the latter afterwards made liable for the payment of the ancestor's debts, is when the records of the Orphans' Court show a final settlement of the personal estate, indicating that all proved debts have been paid in full, and that there is still a balance in the hands of the executor or administrator.

Decided January 12th, 1910.

Appeal from the Circuit Court for Harford County (VAN BIBBER, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

Thomas B. Marshall, for the appellants.

Thos. H. Robinson and *Jos. Townsend England*, for the appellees.

URNER, J., delivered the opinion of the Court.

The questions for determination in this case arise upon exceptions by purchasers to the ratification of the sale of certain real estate of George G. Farnandis, late of Harford County, deceased, and the appeal is from the order of the Court below overruling the exceptions and ratifying the sale.

The proceedings for the sale were based upon Article 16, section 129 of the Code of Public General Laws conferring jurisdiction upon Courts of equity to decree the sale of land held by concurrent owners and not susceptible of division without loss or injury to the parties interested. In the bill of complaint it was alleged that Mr. Farnandis died intestate and unmarried seized of the real estate in question situated partly in Harford County and partly in Baltimore City and described by reference to the deeds under which he acquired title; that the property descended to the plaintiffs and defendants named in the bill, nieces and nephews of the decedent, as his only heirs at law; that they hold the title in the undivided proportions respectively inherited and particularly stated; that they are all adults and reside in Baltimore City; and that the property is not susceptible of partition among the parties according to their respective interests without loss and injury. There was a prayer for a decree authorizing a sale and division of the proceeds, and for general relief. Answers were filed by all the defendants admitting the allegations of the bill and consenting to the passage of a decree as prayed. After the filing of a general replication the cause was submitted by agreement of all the parties, and a decree was thereupon passed. It directed that the lands and premises mentioned in the proceedings be sold, appointed trustees to make the sale, and authorized them, after full compliance by the purchasers, to convey "the property and estate to him,

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her or them sold, free, clear and discharged from all claims of the parties to this cause."

In pursuance of this decree the real estate in Baltimore City described in the bill, consisting of several ground rents, was sold by the trustees, and the sales were duly reported. The appellants were purchasers of some of the ground rents, and they excepted separately, but upon identical grounds, to the ratification of the sales.

The first and principal reason assigned in the exceptions was that no testimony had been taken in the cause, and that, therefore, there was nothing to show that the parties claiming to be such were in fact the heirs at law of the intestate and the only persons sustaining that relation. This objection leads to the inquiry whether the absence of evidence affects the validity of the decree when questioned upon exceptions to the ratification of the sale, and if not, whether the omission to take testimony to prove the title renders it unmarketable independently of any question as to the decree.

The statute under which the proceedings were conducted does not, in its present form, require expressly that evidence be adduced to sustain the allegations of the bill. It provides that the Court may decree a partition of any lands on the bill or petition of any concurrent owner, whether claiming by descent or purchase, "*or if it appear* that said lands cannot be divided without loss or injury to the parties entitled, the Court may decree a sale." Code, Art. 16, sec. 129.

In the Act of 1831, Chapter 311, sec. 1, which dealt with the same subject and which has been amended into the form of the existing statute, it was provided that "if upon the bill and answers and *evidence taken* in the cause, or upon return of a commission ordered by the Court for surveying and ascertaining the premises, it shall appear to the Court that a sale as aforesaid will be most equitable or beneficial for all concerned, said Court may decree a sale accordingly." * * *

The provision for evidence or a commission, as the alternative means of making it appear to the Court that a sale should be decreed, was eliminated from the statute when it was in-

incorporated in the Code of 1860, and it has never since been restored.

It is a general rule that admissions obviate the necessity of proof; *Miller's Equity*, page 195; and this Court, in discussing proceedings under section 213 of Article 16 of the Code relating to the sale of property, under certain conditions of title, when it appears to be advantageous to the parties, has recognized the propriety of accepting the admissions of the parties, if all are competent to bind themselves, as sufficient to establish the jurisdictional averments of the bill. *Snook v. Munday*, 90 Md. 702; *Mewshaw v. Mewshaw*, 2 Md. Ch. 13. But it is contended by the appellants that a sale ought not to be authorized by the Court upon the unsworn declarations of parties that they are the real and only owners of the property because of the opportunity for collusion which such a procedure would afford, and that a purchaser is entitled to the additional assurance furnished by the oaths of witnesses that the entire ownership is concluded by the decree. The question we have now to consider, however, is not whether formal proof would have given the purchasers greater confidence in the title, but whether the decree for the sale was validly passed. If it could be vacated at all at the instance of the purchasers, it would have to be upon the theory that the Court which passed it was without jurisdiction for that purpose.

It is well settled in this State that the only ground upon which an exceptant to the ratification of a sale can question the decree under which the sale was made is that it is void for want of jurisdiction. This rule was clearly stated by JUDGE MCSHERRY in *Hamilton v. Traber*, 78 Md. 28, as follows: "If the Court had jurisdiction to pass the decree, any mere irregularity in the proceeding, or defect in the proof, could not be availed of to impeach the decree collaterally. This has been repeatedly held by this Court. But if the Court was wholly without jurisdiction to decree the sale of the property in the proceedings then before it, the purchaser may successfully rely upon that want of jurisdiction to avoid

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the sale, because the decree would, in such a case, be an absolute nullity."

It has also been held that the test of the Court's jurisdiction in such cases is whether a demurrer would lie to the bill. *Tomlinson v. McKaig*, 5 Gill, 256; *Johnson v. Hoover*, 75 Md. 486; *Hamilton v. Traber*, *supra*; *Slingluff v. Stanley*, 66 Md. 225.

In the case last cited CHIEF JUDGE ALVEY said: "It is the allegations of the bill that confer jurisdiction and determine the power of the Court to decree the sale; and though the proof may be defective, or the decree be passed without proof, that does not affect the question of the jurisdiction of the Court."

In *Newbold v. Schlens*, 66 Md. 590, where a purchaser excepted to the ratification of the sale upon the ground that there was no sufficient evidence produced to establish the fact that it would be advantageous to all parties concerned that the property should be sold or leased, and that, therefore, there was error in passing the decree which might subject it to review and reversal, on a bill of review, filed in the future by some of the infant defendants, this Court said: "But whether there be such evidence or not is quite immaterial on this appeal; for the principle is now too firmly settled to be questioned, that even if the decree could be reversed for errors or irregularities, whether in respect to the evidence or otherwise, provided the Court had acquired jurisdiction to pass the decree, a purchaser in good faith under the decree, while it was subsisting and binding the parties thereto, will not be affected by such reversal. * * * He is bound, however, at his peril, to see that all proper parties to be bound were before the Court, and that he does not take a title, supposed to be covered by the decree, that may be impeached aliunde."

There can be no question in this case as to the jurisdictional sufficiency of the averments contained in the bill, and it appears that all the parties to the proceedings were regularly in Court. It follows, therefore, that the Court below

had jurisdiction both of the subject-matter and of the parties, and under the authorities cited it is clear that the decree for the sale of the property in question is valid and conclusive as against the objection raised by the appellants as purchasers.

The remaining inquiry upon the exception under consideration is whether the absence of proof as to the ownership of the title in a case like the present impairs its marketability and justifies a rescission of the sale on that ground.

The Court does not undertake to sell more than the title of the parties to the suit, and the doctrine of *caveat emptor* applies. *Sansbury v. Belt*, 53 Md. 332; *Bowen v. Gent*, 54 Md. 571; *Downin v. Sprecher*, 35 Md. 483. If there had been formal and ample testimony taken in the case to show that the parties before the Court were the actual and exclusive holders of the title, the decree would not have been binding upon persons who in fact held interests in the property and who were not represented in the proceedings. *Waller v. Riehl*, 38 Md. 220.

It is not incumbent upon the Court to affirmatively assure the purchaser of the validity of the title which it sells, but it is the duty of the purchaser to avail himself of the opportunity afforded under the order *nisi* to investigate the title and discover its defects if any such exist. As was said by the Chancellor in *Brown v. Wallace*, 2 Bl. 600: "The purchaser should ascertain for himself whether or not the title of these parties may not be impeached or superseded by some other and paramount title. For he has no right to call upon the Court to protect him from a title not in issue in the case and in no way affected by the decree." To the same effect is *Andrews v. Scotten*, 2 Bl. 646. This general rule is subject to the qualification that if while the fund is yet in Court, the purchaser is disturbed in his possession, or exposed to be so disturbed, by one having a clear title to the estate, which title was entirely unknown to the purchaser at the time of sale, the transaction may be rescinded. *Glenn v. Clapp*, 11 G. & J. 10. In *Handy v. Waxter*, 75 Md. 519, exceptions by a purchaser to the ratification of the sale were sustained be-

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cause it affirmatively appeared that necessary parties to the proceeding had been omitted and that no clear or good marketable title could be conveyed by the trustees; and in *Heuissler v. Nickum*, 38 Md. 277, the purchaser secured a rescission of the sale upon the ground that there were prior encumbrances, not represented in the proceedings, which would affect the title.

In the present case there is nothing in the proceedings for the sale or in the exception we are now considering to indicate that there is any defect in the title decreed to be sold. If the purchasers could have alleged and shown in an affirmative way any condition having the effect of those existing in the cases we have cited, they might have invoked for their protection the rule there applied. In the absence of even a suggestion that there is in fact some interest not concluded by the decree, or some other defect in the title, we cannot, in view of the previous decisions of this Court, sustain this objection to the sale.

The cases cited by the appellants are not in conflict with the views we have stated. In *Chew v. Lowe*, 93 Md. 250, it appeared that in the execution of a power of sale in a mortgage "a good record title" to the property was offered and sold. The devolution of the title depended upon the assumption of the death of a previous owner whose absence for many years was shown by the evidence but whose death was not conclusively proved. In dealing with this situation the Court said: "Now, as has been seen, the title which the appellant agreed to purchase was 'a good record title,' and it was held that under the circumstances such a title could not be conveyed."

The case of *Caldwell v. Boyer*, 8 G. & J. 136, cited by the appellants, was an appeal from a decree passed in a contested proceeding for the sale of real estate. No sale had been made and, therefore, no interests of purchasers were involved. The cases in other jurisdictions cited by the appellants do not in their facts or principles affect the controlling force of our decisions as applicable to the case here presented.

The remaining ground of objection to the sale is that at the time of the filing of the exceptions certain claims against the estate of George G. Farnandis had been filed in the Orphans' Court of Baltimore City and would constitute a lien on the real estate sold in these proceedings in the event that the personal estate is insufficient to liquidate the indebtedness of the estate, and that it was not possible at that time to ascertain the total indebtedness until the expiration of the notice to creditors then pending, and the filing of an account showing the payment of debts.

It has been held that the "point of time after which the heir or devisee may sell the land to a *bona fide* purchaser without the latter incurring the risk of having the real estate so purchased by him sold afterwards for the payment of the ancestor's or the testator's debts," is "when the records of the Orphans' Court, made in conformity with the law, show a final settlement of the personal estate, and when the settlement indicates that all proved debts and the costs of administration have been paid in full, and that there is still a balance in the hands of the executor or administrator." *Van Bibber v. Reese*, 71 Md. 608.

The order of the Court below ratifying the sales provided that the entire proceeds be held by the trustees subject to the future order of the Court until after the distribution of the personal estate of George G. Farnandis under the order of the Orphans' Court of Baltimore City, and it was conceded in the argument before this Court that the time has now expired for creditors to file their claims, that due notice has been published, that all legal formalities have been observed, and that after the payment of all debts and expenses of administration there remained in the hands of the administrator a large balance which has been duly distributed to the next of kin.

It thus appears that the title to the real estate purchased by the appellants is now secure against proceedings by creditors of the decedent, and we see no reason, therefore, to disturb the action of the Court below on that account; but as the

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title may not have been completely, though it was substantially, protected by the order of ratification, we accede to the suggestion contained in the appellants' brief that equitably the costs of this appeal should be paid out of the proceeds of sale.

Order affirmed, the costs to be paid out of the fund.

WILLIAM R. SCHULTZ vs. STATE OF MARYLAND.

Police Power of Baltimore City—Ordinance Regulating Removal of Garbage.

The Charter of Baltimore City empowers the Mayor and City Council to have and exercise within the limits of the city all power commonly known as the police power, to the same extent as the State could exercise the same within said limits, and also to pass such ordinances as it may deem expedient in maintaining the health and welfare of the city. An ordinance provided that no person except an employee of the city should carry any garbage or other refuse through any streets without first obtaining a permit so to do from the Commissioner of Health, and the Commissioner was vested with discretion to grant and revoke such permits. *Held*, that this ordinance is a valid exercise of the police power vested in the city, since regulations concerning the removal of garbage and offal have a direct relation to the public health.

The fact that a person indicted for a violation of this ordinance removed from hotels only scraps of animal and vegetable matter rejected as food, commonly called garbage, which he fed to hogs, and had invested money in the business of so raising hogs, does not exempt him from the operation of the ordinance, since much of this kind of matter is dangerous to the public health, and its removal may properly be made

subject to public regulation, and all private business is subject to regulations designed to promote public health.

Decided January 14th, 1910.

Appeal from the Criminal Court of Baltimore City (HARLAN, C. J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

James J. McNamara, for the appellant.

Isaac Lobe Straus, Attorney-General and *Eugene O'Dunne* (with whom was *A. S. J. Owens* on the brief), for the appellee.

BURKE, J., delivered the opinion of the Court.

The appellant was indicted, tried, and convicted in the Criminal Court of Baltimore for a violation, on August 5th, 1909, in the City of Baltimore, of Ordinance No. 58 of the Mayor and City Council of Baltimore, approved March 17, 1904. This ordinance is found in *Article 14, sections 108, 109 and 110 of the Baltimore City Code*, and is as follows:

108. No person except the employes of the City of Baltimore, engaged in public work, or persons under contract with the City of Baltimore engaged in public work, shall convey any garbage, house offal or other refuse, animal or vegetable matter through any street, lane, road, alley or public highway of the City of Baltimore, without having first obtained a permit so to do from the Commissioner of Health; after obtaining such permit, it shall be lawful for the licensee named in such permit to convey such garbage, house offal, or other refuse, animal or vegetable matter, in accordance with the terms and conditions of such permit, but in no other manner.

109. The Commissioner of Health may, in his discretion, grant the permit referred to in the next preceding section of

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this article, whenever in his judgment the public health will not suffer thereby; and the Commissioner of Health is authorized at any time when in his judgment, the public health will suffer by the continuance of any permit so granted by him, to revoke the same.

110. Any person or persons violating the provisions of the two next preceding sections of this article, shall be liable to a fine of two dollars (\$2.00) for each offense.

The indictment contains one count, and, after setting out the terms of the ordinance, charged that the appellant not being then and there, on said August 5th, an employee of the city, engaged in public work, and not then and there a person under contract with the city engaged in public work, unlawfully did then and there convey, on said 5th day of August, in the year 1909, certain garbage, house offal and other refuse, animal and vegetable matter, through a certain street, lane, road, alley and public highway of said city, without having first obtained a permit so to do from the Commissioner of Health of the city.

The traverser filed a special plea to this indictment which, in part, is as follows: That three years prior to July 15th, 1909, his employer, Charles H. Scheeler, obtained from the Commissioner of Health of Baltimore City, a permit to haul garbage through the streets, avenues, lanes and alleys of Baltimore City; that during said three years he hauled in liquid tight wagons only fresh scraps of animal and vegetable matter rejected as human food, commonly called garbage, taken twice each day from the Belvedere Hotel, other hotels, clubs and apartment houses, and used said scraps of animal and vegetable matter rejected as human food, commonly called garbage, to feed hogs in Baltimore County; that during said three years the traverser's employer had an agreement with the owners of the Belvedere Hotel that, in consideration of receiving said scraps of animal and vegetable matter rejected as human food, commonly called garbage, the traverser's said employer promised to return to the owners of the Belvedere Hotel all silverware found in said scraps of animal and veg-

etable matter rejected as human food, commonly called garbage; and that during said three years in execution of that agreement the traverser's employer returned to the owners of that hotel silverware valued at about six thousand dollars; that during said three years the traverser's said employer invested thousands of dollars in raising hogs for sale, relying upon his right to haul said scraps of animal and vegetable matter to feed said hogs; that in pursuance of Ordinance No. 109, approved May 7th, 1908, the Mayor and City Council of Baltimore entered into a contract with the Southern Product Company, a corporation of West Virginia, whereby that company agreed to remove and finally dispose of the garbage, dead animals and market refuse in the City of Baltimore for the period of ten years beginning January 1st, 1908, and ending December 31st, 1917, for the sum of six hundred and forty-six thousand dollars; that on July 15th, 1909, the Commissioner of Health of Baltimore City revoked said permit, nevertheless the traverser continued to haul through the streets, avenues, lanes and alleys of Baltimore City said scraps of animal and vegetable matter rejected as human food, commonly called garbage, for the doing of which he was arrested and indicted. The plea then sets out the Ordinance No. 109 which disclosed the contract between the city and the Southern Product Company for the removal and final disposition of the garbage, dead animals, and market refuse of the City of Baltimore. The State demurred to this plea and the Court sustained the demurrer. The traverser then pleaded not guilty, and upon the issue joined upon this plea the case was tried before the Court, and resulted in the verdict of guilty and judgment that the traverser pay a fine of two dollars and costs, and from this judgment he has appealed.

Two questions only are presented for decision upon the record:

1st. Is the ordinance, which we have quoted and under which the traverser was indicted, valid?

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2nd. Do the facts stated in the plea, and which are admitted by the demurrer to be true, constitute a good defense to the indictment?

The validity of the ordinance involves an inquiry into the power of the Mayor and City Council to pass it. If that body had no power to enact it the ordinance is void; if, in enacting it, the city was acting within the powers delegated to it by the State, the ordinance is valid. This power must be looked for in the charter or legislative grant. In *St. Mary's Industrial School v. Brown*, 45 Md. 311, it is said: "And first and principally, we must bear in mind that all such powers are delegated, and depend upon legislative charter or grant; and that the corporate authorities can exercise no power which is not in express terms or by fair and reasonable implication conferred upon the corporation. In construing a grant of municipal powers, in the case of *Minturn v. Larue*, 23 Howard, 435, the Supreme Court of the United States but announced a well established rule when it said: 'It is a well settled rule of construction of grants by the Legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the Act or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the Legislature must be resolved in favor of the public.'"

The subject matter of the ordinance under consideration relates to the health of the city. It is, therefore, the exercise by the city of the police power. It is said in *Strong v. Miss.*, 101 U. S. 814, that "many attempts have been made by this Court and elsewhere to define the police power, but never with entire success. It is always easier to determine whether a particular case comes within the general scope of the power, than to give an abstract definition of the power itself which will be in all respects accurate. No one denies, however, that it extends to all matters affecting the public health or public morals."

JUSTICE MILLER in the *Slaughter House Cases*, 16 *Wallace*, 36, said: "This power is, and must be from its very nature be, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property." "It extends," says another eminent Judge, "to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State; * * * and persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health and prosperity of the State. Of the perfect right of the Legislature to do this no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned."

In *State v. Hyman*, 98 Md. 596, where the whole subject of the police power is elaborately reviewed, Judge McSherry emphasizes the well recognized distinction that must be observed by the Court when exercising its revisory jurisdiction over police enactments. In a case where an Act of the Legislature is under consideration the Court is confined to the inquiry whether the act has a *real and substantial relation to the police power*. If it has such a relation, "then no matter how unreasonable nor how unwise the measure itself may be, it is not for the judicial tribunals to avoid it upon these grounds. Numerous illustrations of this principle are furnished in reported cases. "For it must now be considered as an established principle of law in this country that there are no limits whatever to the legislative powers of the State, except such as are prescribed in their own constitutions, or in that of the United States; consequently, that the Courts, in the performance of their duty to confine the legislative department within the constitutional limits of its power, cannot nullify and avoid a law, simply because it conflicts with the judicial notions of natural rights or morality or abstract justice. * * * But whenever power has been delegated by the

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Legislature to a municipal corporation to adopt and promulgate ordinances for the protection of the public health, morals or safety, the *reasonableness* of the measure enacted by the municipality is a feature to which the Courts look to see whether the measure is within the power granted; and they do this upon the assumption that the Legislature did not intend to empower the municipality to enact unreasonable, or oppressive ordinances."

We have no doubt that the Mayor and City Council had the power under its charter to pass the ordinance in question. Its power to pass ordinances of the character of the one here assailed was fully considered in the recent case of *Rossberg v. The State*, 111 Md. 394, decided at the present term, in which JUDGE PEARCE, speaking for the Court, said: "The powers thus vested in the city are broad and sweeping, and are expressed in terms which indicate a liberal view of the need of broad powers for effective local government of a great city. They are contained in thirty-one sections of the city's charter as it appears in the Baltimore City Code of 1906, and covered twenty-seven pages of that volume. Section 18, entitled, "Police Power" is as follows: "The Mayor and City Council of Baltimore shall have full power and authority: To pass ordinances for preserving order, and securing property and person from violence, danger and destruction, protecting the public and city property, rights and privileges from waste or encroachment, and for promoting the great interests and securing the good government of the City.

"To have and exercise within the limits of the City of Baltimore all the power commonly known as the police power, to the same extent as the State has or could exercise the said power within said limits. But no ordinance heretofore passed or that shall hereafter be passed by the Mayor and City Council of Baltimore, shall hereafter conflict or interfere with the powers or the exercise of the powers of the board of police of the City of Baltimore, heretofore created, nor shall the said city, or any officer or agent of the city, or of the Mayor thereof, in any manner impede, obstruct, hinder or

interfere with the said board of police, or any officer, agent or servant thereof or thereunder."

Section 31, entitled "Welfare and Others" is as follows: "The foregoing or other enumeration of powers in this article shall not be held to limit the power of the Mayor and City Council of Baltimore, in addition thereto, to pass all ordinances, not inconsistent with the provisions of this article or the laws of the State, as may be proper in executing any of the powers either express or implied, enumerated in this section and elsewhere in this article, as well as such ordinances as it may deem expedient in maintaining the peace, good government, health and welfare of the City of Baltimore; and it may provide for the enforcement of all such ordinances by such penalties and imprisonment as may be prescribed by ordinance; but no fine can exceed five hundred dollars, nor imprisonment exceed twelve months for any offense."

"We have not been referred to, nor have we discovered, any other provisions of the charter of the city which relates to the questions involved in this case.

"Broader or more comprehensive police powers could not be conferred under any general grant of police power, for the purposes mentioned in section 18, than those granted in that section, and when we consider the 'Welfare Clause' of the Charter, section 31, greater emphasis could not be laid upon the implied powers of the city for the maintenance of the peace, good government, health and welfare of the city then is there laid."

It cannot be seriously contended that an ordinance which deals with garbage, house offal or other refuse, animal or vegetable matter, is not one which has a direct relation to the police power, or that it is not the duty of the city in the interest of the public health or comfort to assume the regulation and control of such matters.

The fact that this accumulation contains fresh scraps of animal and vegetable matter does not prevent the extension of the police power of the city over the whole subject, as this ordinance does. To admit the right of the appellant, inde

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pendent of the city's control, to select and haul from hotels, clubs and apartment houses such scraps would very greatly weaken the effective control of the municipality over the subject. It would result to a very great extent in the substitution of individual judgment in a matter of vital concern to the city for the judgment of the municipal authorities. It is evident that the recognition of such an uncontrolled right would be fraught with great danger to the public health. "There is so much of this kind of matter that is offensive and dangerous to the health of the community, that it all may be properly made subject to public regulation and control." *State v. Orr*, 68 Conn. 101.

The appellant complains of the effect of the ordinance upon his business, and of what he considers to be the unwarranted action of the Commissioner of Health in revoking his permit. But these things, if true, do not affect the validity of the ordinance, or constitute a defense to the indictment. His business and property are "subject to police supervision and control," and his private interests must be subservient to the general interest of the community. *Slaughter House Cases*, *supra*.

Tested by the principles herein announced we hold the ordinance involved in this case to be a valid exercise by the Mayor and City Council of the police power vested in it by its charter, and since the special plea of the appellant admits that he did the very thing which the ordinance declared he should not do without a permit from the Commissioner of Health, there was no error in sustaining the State's demurrer to the plea.

There are many irrelevant and collateral matters alleged in the plea which, in view of the conclusion we have reached, need not be discussed.

As to the complaints made against the Commissioner of Health, we need only to quote the language of JUDGE McSHERRY in the *Hyman Case*, *supras* "It is not to be assumed that the public functionary will act in an oppressive or unlawful manner. Discretion must be reposed somewhere. If

an official should transcend the legitimate limits of the authority with which the statute clothes him, the injured party is not without redress."

Judgment affirmed with costs.

FRANK G. MOYER vs. ELIZABETH T. JUSTIS.

Sufficiency of Evidence to Show Failure to Invest Money as Agreed.

The plaintiff gave to defendant a sum of money to be invested, and defendant gave her a receipt, stating that that sum had been received "for investment." After several demands for payment, the defendant, more than two years after getting the money, gave the plaintiff a promissory note, bearing date as of the time he received the money, for the amount, payable with interest four years after date, and signed by a certain firm "per" the defendant. At the time defendant gave plaintiff this promissory note, the firm had been put in the hands of a receiver. Interest on the money had always been paid by the defendant. In an action to recover the sum, the Court instructed the jury that if they believed that the plaintiff intrusted to the care of the defendant the designated sum for investment, and that the defendant failed to invest said money, and has not repaid the same to the plaintiff, then their verdict must be for the plaintiff. *Held*, that this instruction is proper, since the evidence is legally sufficient to authorize the jury to find that the defendant did not invest the money he received from the plaintiff.

Decided January 14th, 1910.

Appeal from the Baltimore City Court (DOBLER, J.).

The cause was argued before BOYD, C. J., PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

J. Cookman Boyd (with whom was *Peter J. Campbell* on the brief), for the appellant.

Harry M. Benzinger (with whom was *Edwin R. Stringer* on the brief), for the appellee.

PATTISON, J., delivered the opinion of the Court.

This is an appeal brought by the appellee against the appellant to recover from him four thousand four hundred and two dollars and eighty-four cents (\$4,402.84) that was paid by the plaintiff to the defendant to be invested by him and which she alleges he never invested and which he never returned to her.

The case was tried by a jury and at the conclusion of the plaintiff's testimony, the defendant offered a prayer in which he asked the Court to instruct the jury that there was no legally sufficient evidence to entitle the plaintiff to recover in this case. The Court refused the prayer, and it is from this ruling alone that this appeal is taken. Other prayers were granted both to the plaintiff and defendant, but as the correctness of the rulings upon them is conceded it is unnecessary, for the purposes of this appeal, to set out in this opinion more than the first prayer of the plaintiff, which was granted by the Court.

By this prayer of the plaintiff, the Court instructed the jury: "If they shall believe from the evidence in this case that the plaintiff on the 29th day of April, 1905, entrusted to the care of the defendant the sum of \$4,402.84 for investment, and that the defendant failed to invest said money and has not repaid the same to the plaintiff, then their verdict must be for the plaintiff." The Court also granted the defendant a prayer in which the converse of this proposition was stated.

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The law upon the question involved in this appeal is now well established in this State.

"It is the duty of the Court to decide, as a preliminary legal question, whether there be any evidence legally sufficient to be considered by the jury; and the criterion for the determination of that question is, whether the evidence is of sufficient probative force to enable an ordinary intelligent mind to draw a rational conclusion therefrom, *in support of the proposition sought to be maintained by it.*" *Baltimore Elevator Co. v. Neal*, 65 Md. 459.

"A prayer seeking to take the case away from the jury, on the alleged ground of total failure of evidence to support the plaintiff's case, will not be granted, if there is any evidence, however slight, legally sufficient as tending to prove it, that is to say, competent, pertinent and coming from a legal source, but the weight and value of such evidence will be left to the jury." *Poe's Practice*, page 317, sec. 295.

A case should not be taken from the jury upon a prayer that there is no sufficient evidence to justify the finding for the adverse party, "if there be any evidence from which a rational conclusion may be drawn as opposed to the theory of such a prayer. Before such prayer can be granted, the Court must assume the truth of all the evidence before the jury tending to sustain the claim or defense, as the case may be, and of all inferences of fact fairly deducible from it * * * and this though such evidence be contradicted in every particular by the opposing evidence in the cause." *M'Elderry v. Flannagan*, 1 H. & G. 308; *Leopard v. Ches. & Ohio Canal Co.*, 1 G. 222; *Jones v. Jones*, 45 Md. 154; *Mallette v. British Ass. Co.*, 91 Md. 481.

The facts in this case, as disclosed by the testimony of the only witness, Elizabeth T. Justis, the plaintiff, are these: that prior to the 29th day of April, 1905, the plaintiff had money invested in a trust company in Providence, R. I., where she was receiving interest thereon at the rate of four per cent.; that the defendant, Dr. Moyer, her friend and medical adviser, urged her to send for it, saying that he would

give her better interest, eight, ten or twelve per cent.; she sent for it and on the 29th day of April, 1905, paid over to him the sum of four thousand four hundred and two dollars and eighty-four cents, and he gave to her a receipt therefor, which reads as follows:

"BALTIMORE, April 29th, 1905.

Received of Mrs. Elizabeth T. Justis Forty Four Hundred and Two 84/100 Dollars, for investment.

\$4402.84/100.

FRANK G. MOYER."

The defendant thereafter paid the interest to the plaintiff upon the amount so received by him to the first of the year nineteen hundred and seven. The plaintiff several times called upon the defendant for the payment of this money, the last time being in August, 1907, at which time the defendant gave to her a promissory note, signed by E. Cox Son & Company, per Frank G. Moyer, dated as of April 29, 1905, which reads as follows:

"\$4420.84/100.

BALTIMORE, MD., April 29th, 1905.

Four years after date we promise to pay to the order of Mrs. Elizabeth T. Justis, Four Thousand Four Hundred and Twenty 84/100 Dollars, at Six (6%), due semi-annually.

Value Received.

E. COX, SON & CO.,

No.

due

per FRANK G. MOYER."

And on the back thereof was the following endorsement:

"FRANK G. MOYER."

The firm of E. Cox Son & Company had in the previous month of July passed into the hands of a receiver. This fact, however, was not known to the plaintiff at the time she accepted the note. The plaintiff, not receiving the money that she had entrusted to the defendant, on the fourth day of December, 1907, instituted this suit.

By the instructions of the Court as heretofore stated in plaintiff's first prayer, the jury were told that if they should

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find that the plaintiff on the 29th day of April, 1905, entrusted to the care of the defendant the sum of forty-four hundred and two dollars and eighty-four cents for investment, and that the defendant failed to invest the money and has not repaid the same to the plaintiff, then their verdict should be for the plaintiff.

By the uncontradicted evidence of the plaintiff, she paid to the defendant the amount mentioned in the prayer at the time therein stated, and it has not been repaid to her; leaving, therefore, for the jury to find from the evidence offered, the further fact, "*that the defendant failed to invest said money.*"

We will now apply, to the evidence offered, this test: Is it of sufficient probative force to enable an ordinary intelligent mind to draw a rational conclusion therefrom *in support* of the alleged fact that the defendant failed to invest the money?

In this case we find the defendant, friend and medical adviser of the plaintiff, urging her to displace an investment of more than four thousand dollars in a trust company, saying that he would give her more interest, eight, ten or twelve per cent., which resulted in her changing her investment and paying the money over to him on the 29th day of April, 1905, he giving her only a receipt for this amount, in it saying that it was received for investment. Thereafter the evidence discloses that he, and not E. Cox Son & Company, paid the interest on the money received by him; the rate of interest he paid her, however, is not disclosed.

If the defendant invested this money with E. Cox Son & Company between the 29th day of April, 1905, and the day in August, 1907, upon which he gave the note, no evidence of such indebtedness from E. Cox Son & Company to the plaintiff had ever been given to the plaintiff nor had she received from the defendant anything indicating that he had invested it with E. Cox Son & Co., or with any other person, firm or corporation. It was not until she had repeatedly called upon him for the payment of this money that he gave her the note of E. Cox Son & Company, to which he signed

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the firm's name and dated it back to the time of the payment of the money by her to him, April 29th, 1905, payable in four years thereafter, at the rate of six per cent. At the time this note was delivered to the plaintiff, the firm of E. Cox Son & Company was in the hands of a receiver, which fact at the time was not known by or disclosed to the plaintiff; whether it was known to the defendant or not, is not shown by the evidence, but the fact of the defendant assuming the authority to sign the firm's name to the promissory note for this large amount of money, shows that his relations with the firm were of such a character as strongly to indicate that at the time he gave to her the note he knew of the firm's condition and that it was in the hands of a receiver, and this fact he did not disclose to her.

The legal sufficiency of evidence is for the Court to determine, but its weight, or its sufficiency, to establish another fact, sought to be inferred from it, is exclusively with the jury. *Cole v. Hebb*, 7 G. & J. 39; *Maltby v. Northwestern Va. R. R. Co.*, 16 Md. 445.

According to the test applied, we do not think the Court committed any error in submitting the case to the jury.

Judgment affirmed, with costs to the appellee, both above and below.

JAMES H. FLEDDERMAN vs. CATHARINE A.
FLEDDERMAN, EXECUTRIX.

*Res Judicata—Decree Dismissing Bill Absolutely and Not
Without Prejudice—Appeal—Hearing on Bill and An-
swer—Rule of Court as to Testimony and Hearing—
Erroneous Construction of Rule—Executor Not
Authorized to Bind Estate by Promise to
Pay Claim Adjudicated in Favor
of Decedent.*

A decree passed on bill, answer and pleadings may constitute as effective a bar to another suit for the same cause of action as a decree made after testimony taken.

But a decree dismissing a bill for want of prosecution, without prejudice, is not a bar to a new bill for the same cause. When a decree dismisses a bill absolutely when it should have been dismissed without prejudice, the plaintiff has a right to appeal if he does not mean to acquiesce therein.

A rule of the Equity Courts of Baltimore City provides that after the general replication has been entered to an answer of the defendant, or issue joined on a plea, either party may apply to have the cause set for hearing, and unless within five days after service of notice of such application leave to take testimony be asked by either party, the case shall be placed upon the trial calendar and be heard upon the pleadings. *Held*, that if a case is set for hearing and leave to take testimony is asked by either party, and neither party takes any, the Court may proceed to hear the case on the pleadings without further delay.

If an erroneous construction be placed upon a Rule of Court, in consequence of which a certain order is passed, the remedy of the party aggrieved is by appeal, but the order is valid unless reversed on appeal.

When a decree, after stating that the cause standing ready for hearing was considered on bill and answer, dismisses the

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Syllabus.

bill, that is an adjudication that the answer denying the averments of the bill was taken to be true at the hearing.

A. filed a bill in equity against B. to set aside a transfer of property and for an accounting concerning the alleged indebtedness of B. to him. B. answered the bill, and after a replication was filed, B. asked for leave to take testimony in open Court, which was granted by an order directing that testimony be taken and final hearing had on November 12th. This order was served on A.'s solicitor. Then, on November 12th, the Court made the following decree: "The above cause standing ready for hearing and being considered on bill and answer, and the plaintiff not appearing in Court, and no evidence being offered to sustain the allegations of the bill, and the answer of the defendant denying the equities of the bill," it is adjudged and decreed that the bill be dismissed. A rule of the trial Court provided that after a general replication to an answer either party might have the case set for hearing, and unless leave to take testimony be asked by either party, the case should be placed on the trial calendar and heard upon the pleadings. *Held*, that since neither party took any testimony on November 12, the Court was authorized to hear the case then on the pleadings.

Held, further, that the decree in effect declared that the cause was ready for hearing; that it was considered on bill and answer; that since the answer denied the equities of the bill the bill was dismissed, and that this was a final decree passing upon the merits of the cause as they appeared from the bill and answer.

Held, further, that if the decree was erroneous in dismissing the bill absolutely and not without prejudice, or for want of prosecution, the plaintiff should have appealed, and not having done so, the decree is final and a bar to another suit for the same cause of action.

A party in whose favor a decree or judgment has been rendered may waive that fact as a defense against another suit for the same cause of action by not relying on it. But the question whether he would be liable on a subsequent promise to pay a debt so adjudicated in his favor does not arise in this case. *Quære de hoc*.

An executor or administrator has no authority to bind the estate of the decedent by a promise to pay a claim which had been adjudicated in favor of the decedent in his lifetime.

If an executor or administrator, after admitting that a claim against the estate of the decedent was one proper to be paid, discovers that the claim is such as ought not in justice to be charged on the estate, his previous admission of it does not preclude him from making the defense.

Decided January 14th, 1910.

Appeal from the Baltimore City Court (DOBLER, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS and URNER, JJ.

William L. Marbury and *William L. Rawls*, for the appellant.

By admitting certain testimony over the objection of the defendant below, appellee herein, the Court below ruled with the appellant upon the following propositions:

1. That the plaintiff James H. Fledderman, the appellant herein, was competent to testify as to conversations had with his mother, the defendant below, after her appointment as executrix of the estate of Henry G. Fledderman, deceased. in which she admitted that the claim sued for in this case was justly due to her son, the appellant herein, from the said estate, and in which she promised to pay the said claim so due and owing out of the proceeds of said estate.

2. That this acknowledgment by the executrix was sufficient to remove the bar of the Statute of Limitations and was also competent evidence to establish the existence of the debt.

3. That although the bill of sale offered in evidence, dated October 11, 1899, and the assignment of lease of the property No. 14 East Baltimore street, dated October 11, 1899, were both absolute on their faces, yet as the evidence showed

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Argument of Counsel.

that the transfer of the property, business and interest thereunder was only intended as security for a debt due by James H. Fledderman to his said father, Henry G. Fledderman, an equitable duty arose after said Henry G. Fledderman had reimbursed himself out of the proceeds of the property, business and interest so transferred, to pay over and return to the said James H. Fledderman the excess, if any, realized from the sale of said property, business and interest, over and above the debt due by the said James H. Fledderman, to his said father, Henry G. Fledderman.

4. That although this duty of Henry G. Fledderman to return said excess, over and above the debt due him by his said son, James H. Fledderman, was an equitable duty and one which ordinarily could only be enforced in a Court of equity, yet the subsequent acknowledgment of the executrix of the estate of Henry G. Fledderman that there was an excess in her hands as such executrix due and owing to said James H. Fledderman, and her promise as such executrix to pay said excess so acknowledged to be due, existing and owing, converted the equitable duty before mentioned into a legal duty, and that the same could be enforced by an action at law, in assumpsit, for money had and received.

It will be seen that the only ground, so far as this Record discloses, upon which plaintiff's recovery was defeated was that the subject-matter of his present suit had been finally adjudicated in a former proceeding. The correctness of this ruling upon the question of *res judicata* is therefore the only question now before the Court.

That the decree offered in evidence in this case is not a bar to this proceeding because it shows upon its face that it was not a decision upon the merits of the case in which it was passed, and further, that it was not passed after a hearing of the case or upon a submission of the case without a hearing, one or the other of which was necessary in order for the decree to become a bar to a subsequent suit upon the same matter.

The legal propositions involved in the above statement are.

First—That in order for a decree to be a bar to a subsequent suit upon the same subject-matter it must appear: (a) That it was passed after a hearing; (b) That it was a determination of the merits of the controversy.

Second—That where it appears upon the face of the decree offered as a bar that the plaintiff failed to appear at the hearing or did not agree to a submission of the case without his appearance a dismissal of the bill under these circumstances amounts to a dismissal for want of prosecution, which has the effect only of a *non pros.* in a Court of law, and is not a decision upon the merits after a hearing so as to make the decree a bar to a subsequent proceeding by the plaintiff upon the same subject-matter.

It will avail nothing that the decree in question in addition to saying that the plaintiff did not appear, also says that the Court considered the case upon the pleadings for, when it is disclosed upon the face of the decree that the plaintiff did not appear, all efficacy of the decree as a bar to a subsequent suit is destroyed, because the fundamental requisites of this defense are made impossible of existence, namely, a hearing and a decision upon the merits.

The books show that from the earliest times under the English practice there has been recognized the right upon the part of the plaintiff in an equity suit to do two things with regard to the disposition of his case: 1st. To dismiss it under order of Court at any time before decree and this order is obtained as of course; 2nd. To make default at the hearing and thus have his bill dismissed.

The effect of a decree when the plaintiff pursued either of the above methods to obtain a dismissal of his suit was to leave him free to bring another suit upon the same subject matter. In other words, the effect of the dismissal was identical with that of a non-suit at law, and the decree was not a bar to a subsequent suit.

It was entirely optional with the plaintiff to pursue either of the courses above enumerated to get his case out of Court,

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Argument of Counsel.

and the result of pursuing either course was the same. *Curtis v. Lloyd*, 4 Mylne & Craig, 194.

"If at the time of the hearing a plaintiff in equity is not ready to go on and the Court refuses to grant further time he may move for an order dismissing his bill which should be granted upon payment of costs; if he does not do so the defendant is not entitled to a decree upon the merits, but can only have the bill dismissed for want of prosecution, and such a dismissal like a dismissal upon the plaintiff's motion is not a bar to a new bill." *Kempton v. Burgess*, 136 Mass. 193. See also *Badger v. Badger*, 1 Clifford, 245; *Rosse v. Rust*, 4 Johns. Ch. 300; *State ex rel Kane v. Larrabee*, 3 Pinney (Wis.) 166; *Baird v. Bardwell*, 60 Miss. 164; *Porter v. Vaugh*, 26 Vt. 625; *Sayles v. Tibbits*, 5 R. I. 91; *Lodenbach v. Collins*, 4 Ohio St. 259.

The rule with reference to presumption as to the finality of decrees, as stated by JUDGE MCSHERY in *Martin v. Evans*, 85 Md. 11, is that where the decree is absolute on its face there is a conclusive presumption that it was passed upon the merits. It is not important here, but for the sake of accuracy it is proper to state that all the cases cited by JUDGE MCSHERY to support his statement of the rule, announce the rule to be that where a decree of absolute dismissal is passed after a hearing it will be presumed to be upon the merits. There is no possible doubt that JUDGE MCSHERY did not mean to disregard this qualification as to a hearing. In the case he was then deciding there had been the fullest sort of a hearing and there was no question of that kind in the case.

This has no bearing here because it is stated in the decree now before the Court that the plaintiff did not appear upon the day set for the hearing and that no one appeared representing him. These recitals appearing in the decree itself entirely exclude and overcome all presumption, and we submit, further show that no hearing or decision upon the merits within the rule of *res judicata* was had or made or could have been had or made.

It may be contended by the appellee that in addition to saying that the plaintiff failed to appear the decree goes further and recites that the Court considered the case upon bill and answer and, therefore, it amounts to a decision of the merits within the rule making a former decree a bar. It will be seen from our foregoing argument that this entirely begs the question. When the Court recites in its decree that the plaintiff failed to appear, it states a fact which under the authorities before quoted put it beyond the power of the Court to determine the merits of the controversy so as to be a bar to a subsequent suit. The plaintiff simply defaulted at the time of the hearing and to this the Court could give no other effect than that of a *non pros.* at law. Further, when the plaintiff failed to appear on the day set for the hearing, a hearing was rendered impossible under the circumstances of this case, he not in any way having waived his appearance, for under the authorities before quoted in the event plaintiff failed to appear there could be no hearing and consequently no determination of the merits of the case so as to bar a subsequent suit for the same matter.

But we do not concede that this decree was intended to convey the idea that the merits were decided. Under the circumstances disclosed by the decree the Court was bound to dismiss the bill for want of prosecution, and it was perfectly proper for it to consider the pleadings for the purpose of seeing whether any right had accrued to plaintiff by reason of the pleadings themselves. It might well happen in some cases that the plaintiff would have rights under the pleadings alone which even in case of his default the Court ought to protect. It may seem unreasonable that the Court should be so careful about the rights of defaulting plaintiffs, but such seems to have been the practice under the general rules of procedure. 1 *Daniel, Ch. Prac.*, 805.

The mere absence of plaintiff might not constitute a default within the rule rendering a decree upon default of plaintiff ineffective as a bar to a further suit. He might perfectly well before agree to dispense with his own presence

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as he might submit the case in advance and waive a formal hearing. Such was the case of *Royston v. Horner*, 75 Md. 565. There the parties agreed to submit the case, and agreed to a decree dismissing the bill after the submission. This was as effectual a hearing as could have been given the plaintiff. He had his hearing when he agreed to submit the case without argument, and again when he agreed to a dismissal of his bill. It does seem to us idle to discuss a case such as *Royston v. Horner* in connection with this case. Plaintiff here never submitted his case for decision on the pleadings, and never agreed to the passage of a decree. He relied in legal contemplation upon the right which the law gave him to have his bill dismissed for want of a prosecution, and by doing this he only gave the Court the power to dismiss it so as not to be a bar to a subsequent suit.

There is nothing in this case which can be construed into anything other than a pure default, such as that spoken of in all the cases in connection with dismissals for want of prosecution.

It was the view of the learned judge below, as we understood him, that Equity Rule No. 3 applied to the case in the Circuit Court, and by reason of its operation that Court had the power to consider the case upon the pleadings upon the day the case was set for hearing, and to finally dispose of the case upon its merits even though the plaintiff did not appear. In other words, that in a case where Equity Rule No. 3 operates the Court has the same power to finally dispose of the case as it would have in a case where the parties had submitted the case for decree upon the pleadings.

The appellant's contentions are: 1st. That the conditions necessary to bring Equity Rule No. 3 into operation did not exist in the case in which the decree offered as a bar in this case was passed, and that it could in no way affect the case in the absence of these conditions.

2d. That even if Equity Rule No. 3 operated upon the case in the Circuit Court in which the decree offered in evidence was passed, its sole effect was to get the case down

for a hearing upon the pleadings, and that plaintiff's default at the hearing provided for by this rule is just the same as his default at a hearing apart from the rule, namely, to give to the Court only the power to dismiss the bill for want of prosecution.

The true object of that rule is to dispose of cases upon the pleadings if no application is made by either party to take testimony, and if application to take testimony has been made by either party, then the rule can never operate. In this case both parties in effect had made application to take testimony, and Rule No. 3 was forever excluded from operation upon the case.

Not making any provision for default the rule leaves the default to be governed by the existing general rules of equity. In other words the rule under consideration stops when the case is put down for a hearing upon the pleadings, it does not go further and say that the case may be determined by the Court upon the pleadings if the plaintiff makes default at the hearing provided for. No one can read any such power or authority into the rule. *Rust v. Roose*, 4 Johns. C. 300.

Granting for the sake of the argument, that the decree rendered in the Circuit Court was passed after a hearing, and was a decision upon the merits, still it is not a bar in this case, because here it is shown by the evidence that after said decree was rendered the defendant, appellee herein, acknowledged that the debt sued for in this case was due and promised to pay the same.

The right to plead *res judicata* is just like any other right and may be waived and otherwise dealt with by the party having it as he pleases. In the case of *Cook v. Vimont*, 22 Kentucky (6 T. B. Monroe). 284, this very question was decided. See also *Wilson v. St. Louis, etc., R. R. Co.*, 87 Mo. 431.

In *Van Fleet on Res Judicata*, 380, the law is stated in the same way: "A judgment in favor of the defendant, if he afterwards admits the justness of the claim and promises to pay it, is no defense to a suit on the new promise."

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Argument of Counsel.

Alonzo L. Miles and *W. Trickett Giles* (with whom was *Luther E. Mackall* on the brief), for the appellee.

Where a defendant asks leave to take testimony before the Judge, instead of before an examiner, and the Court fixes a day for the taking of the testimony, and for the hearing of the case, the plaintiff is bound to take his testimony then or not at all; and if he fails to take his testimony then, or to get an extension of the time, the defendant, as if before an examiner, has the right to take his testimony or to waive his right to do so, and have the case heard upon the pleadings.

Since in this case, leave to take testimony before the Judge was asked and a day was set for the taking of the testimony, and for the hearing of the case, and the plaintiff failed to take his testimony at that time, or to get an extension of the time, the Court had the right to hear the case upon defendant's testimony, if he took any, or upon the pleadings, if he did not; and that since defendant did not take any testimony, the Court had the right to hear the case upon the pleadings; and having so heard it, and having after the hearing and a consideration of the case upon bill and answer, passed a decree dismissing the bill, without any qualification, such decree is final and the case cannot now be reopened. *Martin v. Evans*, 85 Md. 12.

The true object of the Equity Rule 3 is not merely to dispose of cases upon the pleadings, if no application is made to take testimony, but to dispose of them upon the pleadings if no testimony be actually taken. The object of the rule is to enable either party to have a case heard and disposed of speedily; and to this end, enables either party to have it set down for hearing, gives both parties an opportunity to take testimony, and provides that unless they avail themselves of this opportunity the case shall be heard upon the pleadings. Nothing is gained by a mere application to take testimony; that does not give the Court any more information than the pleadings themselves; and if such application will suspend the operation of the rule and prevent a hearing, then the rule is worse than meaningless, for not only will it not advance

the hearing of a case, but by merely asking leave to take testimony and failing to take it, one of the parties to a case may, under the authority of this rule, actually delay, instead of advance, the hearing.

The circumstances under which the decree in the former case was passed bring it exactly within this rule. An issue had been joined upon the pleadings; one of the parties (the defendant) had the case set for hearing and when the time for hearing was reached no testimony was before the Court. It follows, therefore, that, under the language of the rule, the case was to "be heard upon the pleadings. The decree, by its very terms, shows that the case stood ready for hearing, and was heard and considered on bill and answer, and that upon such hearing the bill was dismissed. The Court, therefore, having the right to hear the case upon the bill and answer, and having so heard it and rendered its decree, such decree is a final hearing upon the merits and is a final determination of all matters in controversy. This, we respectfully submit, is conclusive of this case.

In *Royston v. Horner*, 75 Md. 567, the case was submitted by the parties for a hearing without any testimony and merely upon the pleadings, and it was held that a decree of dismissal passed upon such hearing, and, so far as the report discloses, in the absence of the plaintiff, was final. So here the plaintiff, by failing to take testimony, impliedly submitted the case for hearing without his testimony and upon the pleadings, and, likewise, we think the decree of dismissal passed upon such hearing is final, whether the plaintiff was present at the hearing or not. The case of *Rust v. Rosse*, 4 Johns. Ch. 300, as well as the other cases cited by appellant, are, in the teeth of *Royston v. Horner*, *supra*.

Even if a new promise would be binding if made by the debtor himself, we submit that such new promise when made by the executor of the debtor cannot be binding. It has been held in some jurisdictions that an executor is not bound to refuse to pay a debt barred by limitations, but may, in his discretion, pay the same; and it has likewise been held that

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a promise by an executor to pay is binding, the original consideration being sufficient to support the new promise. But, so far as we are aware, it never has been held that an executor can, without any consideration moving to the estate, create a new debt which will bind the estate or submit to a Court of law a case that was finally adjudicated by a Court of equity during the lifetime of his testator.

Furthermore, even if the executrix acknowledged the debt, this does not preclude her, subsequently, on ascertaining the grounds of objection to the claim, from urging such objection in a Court of law (*Miller v. Dorsey*, 9 Md. 317, 323). There is no evidence whatever in this case that defendant at the time she is alleged to have acknowledged this debt and promised to pay it, had any knowledge that it had been once adjudicated by a Court of equity. In the absence of such evidence, an acknowledgment of debt will not preclude her, on ascertaining that it had been so adjudicated, from setting up such adjudication in a Court of law. *Miller v. Dorsey*, *supra*.

Boyd, C. J., delivered the opinion of the Court.

This is an action of assumpsit by the appellant against the appellee—the declaration containing six common counts, including one for money had and received by the defendant's testator for the use of the plaintiff. With the declaration was filed an open account by which the defendant is charged with various items, amounting with interest thereon to \$45,637.95. The contention of the plaintiff is that he transferred to his father in the autumn of 1899 his merchant tailoring business, including the merchandise, cash, furniture, fixtures and accounts, and assigned a lease to secure an indebtedness due by him to his father, that it was not intended to be an absolute transfer, and, inasmuch as his father was paid in full what he owed him, he was entitled to be repaid the above amount. General issue pleas, together with one of payment and one of the Statute of Limitations, were filed. Issue was finally joined and a trial of the case resulted in a verdict for the defendant. The Court granted a prayer to the effect that

a decree passed by the Circuit Court of Baltimore City on November 12th, 1900, in a case wherein the appellant was plaintiff, and the defendant's testator was defendant, was conclusive against the right of the plaintiff to recover.

The appellant filed a bill in equity against his father to have the bill of sale, which he had given to secure as he alleged what he owed his father, annulled and set aside, to require an accounting by the defendant, and to compel him to pay over to the plaintiff all sums received by him, and to restore and to deliver unto him the lease, the possession of the premises, and all goods and property of every description taken possession of under the bill of sale. It is conceded that the matters involved in the equity proceeding were the same as are now sued for, and the principal question is whether the decree passed in that case was a final adjudication of the controversy. The appellant contends that the bill was dismissed simply for want of prosecution, while the appellee claims that it was such a final disposition of the case as to make the defense of *res adjudicata* an absolute bar to this suit.

The decree was as follows: "The above cause standing ready for hearing and being considered on bill and answer, and the plaintiff not appearing in Court, and no evidence being offered to sustain the allegations of the bill, and the answer of the defendant denying the equities of the bill, it is this 12th day of November, 1900, by the Circuit Court of Baltimore City, adjudged, ordered and decreed, that the bill of complaint in this cause, be and the same is hereby dismissed and that the plaintiff pay the costs."

As it is not denied that the bill in equity was intended to recover the money and property sued for in this case, there is no such question before us as is frequently presented in cases of this character, but it is simply whether that decree was dismissed for want of prosecution, or whether it was an adjudication by the Court of the questions involved, on the pleadings. There can be no doubt that a decision of a case on the pleadings may be as effective a bar, as one on testi-

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mony. If, for example, a case is submitted on bill and answer the averments in the answer are taken as proven, and hence there can be no logical distinction made between the effect of a decree rendered on bill and answer and that of one entered after testimony is taken.

There are certain general principles on the subject of *res adjudicata* well established in this State, as well as elsewhere, which should be kept in mind in considering the case. In *Royston v. Horner*, 75 Md., on page 565, as well as in other Maryland cases, the rule as stated by JUDGE STORY in his *Equity Pleading*, sec. 793, has been approved, that: "A decree or order dismissing a former bill for the same matter may be pleaded in bar to a new bill, if the dismissal was upon the hearing, and was not in terms directed to be without prejudice. But an order of dismissal is a bar only where the Court has determined that the plaintiff had no title to the relief sought by his bill; and therefore, an order dismissing a bill for want of prosecution is not a bar to another bill." In *Martin v. Evans*, 85 Md. 8, the subject was discussed at some length by CHIEF JUDGE McSHERRY, who stated the general rule to be that: "Whenever a decree dismissing a bill in equity fails to restrict its own scope, the presumption, according to the great preponderance of decided cases, is, that the issues raised by the proceedings have been disposed of on their merits, and they therefore become *res adjudicata*." Amongst other authorities cited by him was 6 *Ency. of Pl. and Pr.* On pages 992 and 993 of that volume the principle is thus stated: "A dismissal or non-suit may be upon the merits. It then concludes the parties as to all matters involved in the issue, whether they were actually decided or not. * * * At law the presumption is that a non-suit is merely formal unless it be affirmatively shown to have been upon the merits. The same rule appears to apply generally to judgments of dismissal at law. In chancery the opposite rule obtains, and a general decree dismissing a bill will be presumed to have been upon the merits, and a final settlement of the controversy unless the decree was collusive, although

the decree was pronounced by a divided Court. The presumption attaches unless the statements of the record show that the dismissal was for some cause not going to the merits; and of course the whole record may be examined to find out what was actually decided or might have been decided. * * * To obviate the general presumption of dismissal upon the merits, the dismissal should be stated in express terms to be made 'without prejudice.' Wherever it is not actually upon the merits, the term is used in order to reserve to the parties the privilege of enforcing their rights by subsequent proceedings and to destroy the effect of dismissal as a bar. An absolute dismissal where the dismissal should have been without prejudice is reversible error; and the appellate Court will either reverse and render a decree 'without prejudice' or modify and affirm, or remand the cause with instructions to dismiss without prejudice."

An order was passed on May 21st, 1900, on the bill filed by the appellant against his father, that a receiver be appointed, unless cause to the contrary be shown on or before the 16th day of June, 1900. That was duly served on the defendant, who filed in due time an answer to the bill of complaint, which also showed cause why a receiver should not be appointed. On September 7th, 1900, a general replication was filed, and on the 10th of that month the defendant filed a petition stating that he desired to examine witnesses in open Court and asking an order for that purpose. An order was passed granting leave to take testimony as prayed, and that it be taken as required by the thirty-fifth rule of the Court, which prescribes the method of taking such testimony. On October 6th, 1900, the defendant filed another petition to the same effect, and the Court passed an order granting leave to take testimony under that rule, and added: "It is further ordered that the taking of said testimony and the final hearing be and the same are hereby set for the 12th day of November, 1900." That order was served on the plaintiff's solicitor on the 9th of October. The docket entries also show this entry: "12 October, 1900. Rule hearing for November

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12, 1900. Order fd., copy issued (served on William Colton, solr.).” The next docket entry is that of the decree above set out.

Rule 3 of the lower Court is as follows: “After the general replication has been entered to the answer of the defendant, or if any issue be joined upon a plea, either party may apply to have the case set for hearing; and unless within five days after service of notice of such application leave to take testimony be asked by either party, the case shall be placed upon the trial calendar and be heard upon the pleadings.” The solicitors for the respective parties differ widely as to the proper construction of that rule, and also as to whether it is applicable at all, and, if so, how far applicable to the facts of this case.

The record shows that a general replication had been entered, and apparently that the defendant did apply to have the case set for hearing. While the petition of October 6th did not ask to have the case set for hearing, the Court did, on the application to take testimony in open Court, order that it be taken, and that there be a hearing on November 12th. But if there is any doubt about the effect of that, the entry of October 12, above set out, would seem to establish that it was set for hearing for November 12. It is true there is no written application for that in the record, but the entry of the rule on October 12th—which was three days after the copy of the order of October 6th was served on the solicitor—is there, and the decree itself states that the case was ready for hearing. If we treat the application to have the case set for hearing as of October 12th, then leave to take testimony was not asked within five days after service of notice of such application, and if we treat it as made on October 6th, application to take testimony was made at the same time. As either party has the right to ask leave to take testimony, while it might be somewhat irregular, it is not perceived how injury is done the other party, if the one who applies to have the case set for hearing at the same time asks leave to take testimony.

The appellant must take one horn or other of the dilemma—either that neither side asked to take testimony, as provided under Rule 3, or that the application of the defendant was sufficient. Accepting the latter view, the next question is as to the construction of the rule as applicable to those conditions. If a case is set for hearing, and leave to take testimony is asked by either party, and neither party takes any, can the Court proceed to hear the case on the pleadings without further delay? We are of the opinion that must be answered in the affirmative. It never could have been intended by the framers of that rule that a party could gain time, simply by asking leave to take testimony and then not taking it. The object of the rule manifestly was to prevent unnecessary delay, but if it must be construed to have such effect as is contended for it, the result would be the very opposite of what was intended. The rule, we think, was intended to give either party the opportunity to take testimony, but if not taken, then to dispose of the case on the pleadings.

But after all, are we not to be governed by the construction placed on the rule by the judge who passed the decree, if we can ascertain that from the decree, and not by what we may think is a proper construction of the rule? If that judge erroneously construed the rule, and passed a decree which was not authorized, then the remedy of the plaintiff was an appeal. *Barrick v. Horner*, 78 Md. 259; *State, use of Brumer, v. Ramsburg*, 43 Md. 333. If he passed a decree which would bar the plaintiff from bringing another suit, when he was only authorized to pass one that would be equivalent to dismissing the bill for want of prosecution, the remedy was likewise an appeal. "An absolute dismissal, when the dismissal should have been without prejudice, is reversible error." 6 *Ency. of Pl. and Pr.*, 993. See also *Griffith v. Fred Co. Bank*, 6 G. & J. 424; *McElderry v. Shipley*, 2 Md. 37; *McDowell v. Goldsmith*, 24 Md. 230, and *Miller's Eq. Proc.*, 332.

We must therefore ascertain what the judge *did* by the decree, as what he had the right to do is not now the ques-

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tion. If the statement "and the plaintiff not appearing in Court and no evidence being offered to sustain the allegations of the bill," had not been inserted there would be but little room to question the effect of the decree, under the decisions in this State. It would then have read: "The above cause standing ready for hearing and being considered on bill and answer, and the answer of the defendant denying the equities of the bill," it is adjudged, ordered, etc. Whatever may be said in *Rosse v. Rust*, 4 John. Ch. 300, and other cases cited by the appellant, the case of *Royston v. Horner*, *supra*, would seem to be conclusive of that question in this State. The Court quoted from that decree: "This case being submitted on bill, answer and exhibits by agreement of counsel," and went on to say: "This can mean but one thing, that it was submitted for decision in that way. And, when submitted in that way, the Court upon the answer of the defendant denying the allegations of the bill could do nothing but dismiss it; for when a case is submitted on bill and answer, all the averments of the answer, whether responsive to the allegations of the bill or in avoidance of it, are to be taken as true." And then after indicating that the reason the assent of the parties was referred to in the decree was because the costs were disposed of differently from what is usual in a decree on bill and answer which denies the equity of the bill, the Court said: "It may have been without argument, and it is reasonably inferable that it was; but argument is not necessary to make it a hearing, for *it is being heard when what the parties say in the bill and answer is considered by the Court.*"

In the decree now under consideration, the Court not only said the case was "standing ready for hearing," but, "being considered on bill and answer," "and the answer of the defendant denying the equities of the bill." It was therefore declared that it was ready for hearing, that it was considered on bill and answer and that the Court found that the answer denied the equities of the bill. Finding those facts the Court was required to dismiss the bill, just as it was in *Royston v.*

Horner. If, as we said in that case, "it is being heard when what the parties say in bill and answer is considered by the Court," how can it be said in view of the recitals in this decree, that *there was no hearing*? There would seem therefore to be no room to doubt, that unless the omission we made above, in reciting the decree, shows the contrary, the judge intended to make it final, and was passing on the merits as he found them from the bill and answer, and of course he knew the effect of deciding the case on bill and answer to be that he must accept the averments in the answer as true.

But of course in considering the decree, we cannot ignore the statement referred to—"and the plaintiff not appearing and no evidence being offered"—and must give it its proper effect. Was not that inserted because the judge considered the action already taken as sufficient to authorize testimony to be taken, and hence, as the plaintiff neither appeared nor offered testimony to sustain the allegations of the bill, under the rule of Court, he was required to decide the case on the pleadings? There was perhaps no necessity for referring to the fact that the plaintiff did not appear, but it may have been that it was inserted in the decree to show that the plaintiff did not ask for further time, or that he was not there to attempt to sustain the bill by his testimony. But whatever the reason, if the presumption is as we said in *Martin v. Evans*, then the mere statement that the plaintiff did not appear in Court cannot overcome the presumption raised by the other terms of the decree. If the bill was dismissed because the plaintiff did not appear, then there was no occasion to consider the case on bill and answer, and particularly not to refer to the fact that they were considered. It would only have been necessary to have said, "the above cause standing ready for hearing, and the plaintiff not appearing in Court, it is adjudged," etc. Or if the judge had supposed that he must dismiss the case for want of prosecution, because the plaintiff did not appear and no testimony was taken, there was no reason to say that he had considered the bill and an-

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swer, for if he treated those reasons as a cause of default simply, there was no occasion to consider the bill and answer.

It was argued, however, by counsel for appellant that the judge could properly examine the bill and answer, to see whether there was anything in them to require him to retain the bill, but that could only be necessary on a hearing on the bill and answer. If, for example, he had found that the answer admitted such allegations of the bill as entitled the plaintiff to relief he could have granted the relief, although the plaintiff did not appear. If a plaintiff is in such default for not appearing as requires or authorizes the Court to dismiss his bill, he has no right to require the Court to examine the pleadings to see whether he is entitled to relief on them. A defendant in a suit at law may file a plea, which admits the right of the plaintiff to recover something, but if the plaintiff does not appear when the case is called, the defendant may ask to have the case non-prossed. The Court would not examine the papers to see whether the plaintiff was entitled to judgment, but would dismiss the case for the default, if his failure to appear was a default under the rules or practice of the Court. One of the cases relied on by the appellant illustrates the point: In *Baird v. Bardwell*, 60 Miss. 164, the decree was: "This cause coming on this day to be finally heard, and the said complainant in person or by counsel failing to appear, after being duly called, on motion of counsel for defendant, it is ordered," etc., that the bill be dismissed. The Court said: "The absence of the complainant in no degree affected the right of the defendants to submit the case for final hearing. They had the right to do this, or to have it dismissed for want of prosecution."

So it seems clear to us that the decree shows on its face that the judge did not intend to dismiss the cause because of the default of the plaintiff, either in not appearing or not offering testimony, but he thought that under his construction of the rule he had the right to decide the case on the pleadings, and did hear it on bill and answer, and having so heard it he decided it on the merits, just as much as if the

allegations in the answer had been sustained by proof. The case of *Royston v. Horner*, is conclusive of the latter statement, as it was submitted on bill, answer and exhibits, and the decree was held to be a bar to another suit. Indeed, if that were not so, hearing a case on bill and answer would be of little use.

It may be that the plaintiff could have appeared and dismissed the bill, and thereby relieve himself of the effect of a decree by the Court, but he did not adopt that course, and it is not necessary to decide that question. If he supposed that if he did not appear the case would be dismissed without prejudice, or for want of prosecution on account of not appearing, and not be precluded from bringing another suit, he could have had this decree reviewed on appeal, and, if his present contention had been held to be correct, could have had the decree reversed or modified, but not having done that he is bound by it, as passed.

The only remaining question is the effect of the alleged promise by the defendant, after she qualified as executrix. It is contended that as there is evidence tending to show that after the decree was granted, the appellee acknowledged that the debt sued for in this case was due, and promised to pay it, the decree is not a bar to this suit, even if it would otherwise be so. It cannot be doubted that a party in whose favor a decree or judgment has been rendered can waive the defense he would be authorized to make, against another suit for the same cause of action. That may be done by not offering the record of the former case in evidence. And we do not deem it necessary to deny that a party who has thus had a decision in his favor may be liable on a subsequent promise to pay the debt. The case of *Cook v. Vimont*, 22 Kentucky (6 T. B. Monroe) 284, is a direct decision in favor of the proposition, although we do not mean to adopt it in all respects. But we have been cited to no case which has gone to the extent of holding that the promise of an executor or administrator, to pay a claim which had been adjudicated and determined in favor of his testator, or intestate, in his lifetime would bind

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the estate. This case is as good an illustration of the danger of such a rule as could be given. The testator denied under oath any indebtedness or obligation to the appellant, on account of the claim then and now in controversy, and died on the 27th of January, 1908,—over seven years after the decree was rendered, but the second suit was not brought until after his death. The appellant claims that after his mother became executrix, and while she was living with him, he repeatedly told her about the claim and she said she knew that his father owed it to him, and promised to pay it. He admitted that he had filed a bill of complaint against his mother, asking that she be removed as executrix, and that a receiver be appointed to take charge of the estate. He said: "I filed that bill, but I didn't swear that she was insane. I only meant that she was not capable of taking care of her money and she is not, and she does not know any more than that book about taking care of finances. My mother is wholly incompetent of taking care of her money." Again he said: "I never thought she was insane. I never made such a statement in my life. I meant she was mentally incompetent, and does not know anything about business matters or money matters, and is not able to take care of her money, and I was doing that to try and protect her money." He persuaded her to renounce the will of his father, and the testimony shows that while she lived with him he had considerable influence over her, although at the time of the trial she had nothing to do with him. Of course we are aware that such matters would not necessarily prevent his recovery, if the defendant could be held on her alleged promise, but they strikingly illustrate the danger of permitting an executor to thus bind the estate of the testator. If a party can wait for over eight years after a decree of this kind has been entered before bringing another suit, and then, when the other party to the controversy is dead, rely on a promise of the executor to pay what the testator had declared under oath he did not owe, and what had been adjudicated by a decree of the Court in his favor, there would be no protection to the estate of any decedent, but

especially would that be so when it is admitted by the party seeking to establish a claim that the executrix, upon whose promise he relies, is utterly incapable of attending to business, and could not even take care of her own money. The alleged admission that the debt was due would not only contradict the testator, but in effect would prove him guilty of perjury. It is inconceivable that any jury would believe that the appellee would make such a promise if she understood what it meant, and if the testimony of the appellant as to her competency, was accepted, a jury could not believe she did so understand it, but if there be no other reason for not permitting a claim to be established by the admission or promise of the personal representative of the decedent, when it had been determined to be invalid in his lifetime, public policy would prevent it. In *Miller, Admr., v. Dorsey*, 9 Md. 317, LEGRAND, C. J., said: "It cannot be pretended that if an administrator should, after acknowledging a claim against the estate of his intestate, discover that it had been paid, he would be debarred from setting up such fact to defeat the claim." In *Webster v. LeCompte, Exr.*, 74 Md. 249, a prayer was offered that if the jury believed that one of the plaintiffs presented the claim to the executor and requested payment of it, and that the defendant promised to pay it if said plaintiff would have it proven and passed, and thereupon he did prove it and have it passed by the Orphans' Court, then the defendant was bound to pay it, and the jury must find for the plaintiffs. The Court in passing on it, after saying that the alleged promise that the executor would pay it was made before he became executor, added: "But an admission or promise by an executor or administrator is not under all circumstances to be regarded as binding and conclusive as against the estate. For though an executor or administrator may recognize a claim as proper to be paid, yet if he afterwards discovers that the claim has no legal foundation, or that it is such as ought not of right and in justice to be charged upon the estate represented by him, no previous recognition or admission by him ought to or can preclude him from making the proper de-

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fense, and with the same effect as if no such previous recognition or admission had occurred. This plain principle of right and justice is fully recognized by this Court in the case of *Miller, Admr., v. Dorsey*, 9 Md. 317, 323; and applying it here, the Court below could not do otherwise than reject this third prayer of the plaintiffs." That applies with much greater force to a claim such as this which had been adjudicated in favor of the testator, when he was alive and able to defend himself.

It is true that executors and administrators may revive claims barred by the statute of limitations by promises to pay or acknowledgments of them, but that it is a different question. The claim still exists, and oftentimes justice requires that it be paid, and so with one affected by a discharge in bankruptcy or insolvency. But when a case has been tried on its merits, in the lifetime of the decedent, and decided in his favor, there is no principle of justice which would require or permit his personal representative to bind his estate by admitting the claim to be due or promising to pay it. No estate would be sufficiently protected by the law, if it was permitted. The law does not favor stale claims, especially when made after the death of an alleged debtor, and when one has been passed upon in his lifetime and determined in his favor in such way as to bar further suit upon it, there could be no possible reason why his personal representative should be allowed to become in effect a Court of review, determine that it was a valid claim and then bind the estate on his judgment of its validity. The interests of creditors and distributees of estates should not be jeopardized by establishing such a doctrine, and they, and not the executor, would generally be the sufferers.

So, without further discussion of the questions involved in this case, we will affirm the judgment.

*Judgment affirmed, the appellant to pay
the costs above and below.*

CHARLES H. PORTER ET AL. vs. MARY A.
CONNOLLY ET AL.

Distribution of Assets of Insolvent Partnership—Party Entitled to Share as Creditor of Firm.

Articles of partnership between A. and B. stipulated that B. should procure a loan of five thousand dollars, to be used as the capital of the firm, by causing the promissory note of the firm for that amount to be discounted and renewed for use in the business; that the note should be a partnership indebtedness, to be retired and paid out of the profits of the business as rapidly as could be done without impairing the capital, and that no division of the profits should be made until payment of the note. The endorser of the firm's note, who obtained its discount, agreed to do so in consideration of A.'s entering into the partnership with B. A few years afterwards the firm became insolvent, and upon a distribution of its assets in the hands of the receivers, exceptions were filed to the claim of the endorser who had paid the firm's note. *Held*, that under the agreement, the note was not to be paid exclusively from the profits of the firm's business, but that it created the relation of debtor and creditor between the firm and the endorser, and that the endorser is now entitled to share as a creditor in the distribution of the assets.

Decided January 14th, 1910.

Appeals from the Circuit Court No. 2 of Baltimore City (SHARP, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS and UNER, JJ.

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James U. Dennis and *T. Howard Embert* (with whom were *Alexander Yearley III* and *Samuel K. Dennis* on the brief), for the appellants.

Isaac Lobe Straus, for John J. Mahon, appellee.

BRISCOE, J., delivered the opinion of the Court.

There are three appeals, in this record, each from the Circuit Court No. 2 of Baltimore City, but as they are from the same decree and present the identical questions, they will be considered as one appeal.

The appellant on each appeal is a creditor or represents a claim against the insolvent estate of Mary A. Connolly and Mollie A. McRae, co-partners, trading as Connolly and Company, who prior to their insolvency conducted a millinery business in the City of Baltimore.

The appeal, it will be observed, is from an order or decree of the Circuit Court No. 2 of Baltimore City, passed on the 3rd day of July, 1909, overruling certain exceptions by the appellants and other creditors of the estate to the allowance of the claim of Mr. John J. Mahon, of Baltimore City, filed on the 9th of March, 1909, for \$5,062.50, and decreeing that the claim is entitled to share and participate with the general creditors of the insolvent firm, in the distribution of the assets of the firm in the hands of receivers.

The facts which give rise to the controversy are as follows: On the first day of January, 1903. Mary A. Connolly and Mollie A. McRae, wife of George McRae, and a daughter of John J. Mahon, formed a co-partnership under the firm name and style of Connolly and Company, for the purpose of conducting a millinery business in the City of Baltimore, for the term of five years next thereafter, terminating on the thirty-first day of December, 1907.

By the fourth clause of the articles of partnership it was stipulated: The party of the first part agrees to give her entire time, business experience and knowledge to the business of said partnership, and the party of the second part agrees to

procure a loan of the sum of five thousand dollars, to be used as the capital of said co-partnership, by causing and procuring the promissory note of said co-partnership for the sum of five thousand dollars to be discounted, and the same to be renewed from time to time during the continuation of the said co-partnership as its business needs may require; the said promissory note and its renewals to be a partnership indebtedness and liability and to be retired and paid off out of the profits of the partnership business as rapidly as it may be able to do so, without impairing its capital and business resources. That no division of partnership profits shall be made between the partners (except the weekly salaries hereinafter mentioned), until the said promissory note above mentioned and all renewals thereof shall have been fully paid and satisfied, and then only by the assent of both partners and when such profits shall not be deemed necessary to the advancement of the partnership business. The indorsers of the promissory note hereinbefore recited shall assent hereto and agree to grant their indorsements of all renewals of the said promissory note that the partnership business may require.

By the fifth clause, it was further provided: It is agreed that in consideration of her business experience said Mary A. Connolly shall receive from the partnership assets a salary of fifteen dollars per week, and the said Mollie A. McRae shall receive a salary of ten dollars per week, the same to be payable weekly, and which said salaries shall be charged to expense account as part of the cost of conducting the business of said co-partnership. That profits shall be divided equally between the said partners and be payable and distributable as hereinbefore provided.

The articles of partnership were executed, signed and sealed by Mrs. McRae and Miss Connolly, and below their signatures on the agreement of partnership appears the following:

"In consideration of Mary A. Connolly entering into the above co-partnership with Mollie A. McRae, the undersigned,

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being the husband and father of said Mollie A. McRae, hereby agree to endorse and procure the discounting of the note of said co-partnership for the sum of five thousand dollars, and to renew and procure the renewal of the discount of said promissory note as in the foregoing agreement mentioned.

"Witness their hands and seals this day of January, in the year one thousand nine hundred and three.

GEORGE McRAE, (Seal)
JOHN J. MAHON. (Seal)"

The business continued until March 16th, 1908, when the firm became embarrassed, and receivers were appointed to take charge of its assets.

Subsequently, on March 5th, 1909, an auditor's account was filed by the receivers, showing cash assets of \$3,231.51, in hand, for distribution, and claims amounting to \$4,593.16, were filed, against the estate. There was a dividend to creditors declared of about forty-four per cent. on the claims filed and proved.

On the 8th of March, 1909, and before the auditor's account had been ratified, the claim of Mr. Mahon for \$5,062.50 was filed, with proper affidavit annexed, as follows:

"Connolly and Company,

To John J. Mahon, Dr.

For cash loaned and advanced, as follows:

Note of Connolly and Company for \$5,000, discounted by the National Marine Bank, said sum having been borrowed and obtained by said Connolly and Company upon and by virtue of the endorsement of said John J. Mahon at the instance and request of said Connolly and Company, and upon failure of said Connolly and Company the said John J. Mahon, as endorser of said note, was compelled to pay the same. . . . \$5,000.00

Interest on above note for three months, at 5% . . . 62.50

\$5,062.50."

Afterwards, on the 15th of March, 1909, exceptions were filed to the auditor's account by Mr. Mahon, upon the ground that he was a creditor of the insolvent estate, for money loaned and advanced to the firm, and that his claim had been precluded from participation in the property and assets of the firm. And by a petition filed on the same day, the Court was asked to pass an order directing the auditor to restate the account and to allow a *pro rata* part of his claim.

On the 18th of March, 1909, two of the receivers, Messrs. Dennis and Yearley III, answered the petition, contesting the validity of the Mahon claim, and objecting to the restating of the account. Exceptions were also filed to the allowance of the claim by the two receivers, and by twelve of the general creditors having claims against the estate.

The case was heard upon the petition, exceptions, proof and agreement of counsel, filed on the 2nd day of July, 1909, and from a decree of Court, passed on the 3rd of July, 1909, overruling the exceptions to the Mahon claim and directing it to participate in the distribution of the assets of the firm. these appeals have been taken.

The questions involved on the appeals, turn upon the proper construction to be given the fourth clause of the agreement of co-partnership between Miss Connolly and Mrs. McRae, in connection with the addenda, over the signature of George McRae and John J. Mahon, to the effect, that in consideration of Mary A. Connolly, entering into the above co-partnership with Mollie A. McRae the undersigned, being the husband and father of Mollie A. McRae, hereby agree to endorse and procure the discounting of the note of said co-partnership for the sum of five thousand dollars and to renew and procure the renewal of the discount of said promissory note, as in the foregoing agreement mentioned.

The substantial facts, upon which Mr. Mahon's claim rests, are in part set out in "the Agreement of Counsel" filed in the case, and are as follows: "That the claim of John J. Mahon for the sum of five thousand dollars (\$5,000) principal, and \$62.50 interest, heretofore filed in this case, is for the sum of

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five thousand dollars, with interest, paid to the National Marine Bank by John J. Mahon as an endorser upon a promissory note made by George P. McRae, and as endorser upon several successive renewals of the note, which note and which renewals, respectively, were discounted at the National Marine Bank, the note and the renewals having been given and having been endorsed by John J. Mahon under and in accordance with the agreement of partnership between Mary A. Connolly and Mollie A. McRae, executed in January, 1903, for the formation of the firm of Connolly and Company, and to carry out the purpose of obtaining a loan of five thousand dollars (\$5,000) for the partnership of Connolly and Company, as provided in the agreement; the five thousand dollars (\$5,000), with interest, having been actually paid by John J. Mahon to the National Marine Bank as the endorser aforesaid upon the promissory note and the renewals respectively thereof, and the proceeds of the note having been turned over to and used by the firm of Connolly and Company, as contemplated and provided for in the agreement; and, further, that no part of the five thousand dollars (\$5,000), or proceeds of the note or the interest thereon has ever been paid by the firm or by anyone, for or on its behalf, to John J. Mahon, and that he has received nothing whatever on account thereof from any source whatever, but it is expressly reserved that this agreement does not in any way admit that the claim is a proper claim under the facts of this case to be allowed as a claim against the partners of the firm of Connolly and Company or against the firm, nor that the claim has any right to be allowed a dividend out of the assets of the firm of Connolly and Company in the hands of the receivers."

It appears also from the testimony of Mr. Mahon, that the \$5,000 was procured as a loan in accordance with the terms of the agreement of partnership, and it also appears from the evidence that the money was obtained by the firm and entered on their books as a charge to capital on January 19th. 1903. The original note was discounted for the busi-

ness, of the Connolly firm, and the subsequent renewals for the benefit of that firm.

It appears to us, upon a careful reading and consideration of the language of the contract of partnership between the parties, and upon the testimony in the case, that the agreement was one for the loan of money, and created the relation of debtor and creditor between Mr. Mahon and the firm of Connolly and Company, and that Mr. Mahon's claim, was properly allowed by the Court below to participate in the distribution.

The most cursory reading of the contract shows, that it cannot be considered as a contract of partnership between Mrs. McRae, Miss Connolly and Mr. Mahon. The language of the contract itself would forbid any such construction.

The parties to the contract were Miss Connolly and Mrs. McRae, and the latter, as the party of the second part, according to the express terms and wording of the agreement was "to procure a loan of the sum of five thousand dollars to be used as the capital of the co-partnership, by causing and procuring the promissory note" of the firm for this sum to be discounted, and to be renewed during the continuance of the partnership as its business needs may require, and the promissory note and its renewals to be a partnership indebtedness and liability and to be retired and paid off out of the profits of the partnership business as rapidly as it may be able to do so, without impairing its capital and business resources.. There is nothing in the evidence to show that Mr. Mahon held himself out, or permitted himself to be held out as a partner, whereby the public was misled or extended credit to the firm, or that he was in any sense an ostensible partner. On the contrary, as was said by this Court in *Thillman v. Benton*, 82 Md. 75, by every fair rule of construction, it was an agreement by which the defendant was to loan to the company, * * * and to be paid for the loan, a partnership indebtedness and liability, out of the profits of the partnership business, as rapidly as it may be able to do so.

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This construction of the contract, here in dispute, we think, is supported by the real intention and contract of the parties and by the decisions of this Court and the American authorities. *Fletcher v. Pullen*, 70 Md. 205; *Lighthiser v. Allison*, 100 Md. 103; *Thillman v. Benton*, 82 Md. 64; *Mollo, March & Co. v. Court of Wards*, L. R., 4 Privy Council Appeals, 49; *Boston, etc., v. Smith et al.*, 13 R. I. 27; *Newlin, Admr., v. Bailey et al.*, 15 Bradwell (Ill.) 199; *Polk v. Buchanan*, 5 Sneed (Tenn.) 722.

But the appellants contend that by a proper construction of the agreement Mr. Mahon was to be protected in his endorsement of the note, only by the profits of the business. There would be no difficulty whatever as to this position if the contract was susceptible of the construction here urged by the appellants and that the profits exclusively were to be the sole and only repayment of the loan, and if there were no profits, there would be no claim on the note. We entirely concur with the reasoning of the Court below, upon this branch of the case, wherein it is stated: "The agreement will not bear that construction. The language of the agreement is "the party of the second part" (Mrs. McRae) "agrees to procure a loan of the sum of \$5,000, to be used as the capital of said partnership by causing and procuring the promissory note of said partnership for the sum of \$5,000 to be discounted." * * * "The said promissory note and its renewals to be a partnership indebtedness and liability. It is apparent that this loan was to be repaid by the firm."

The clause stipulating "note to be paid off out of the profits" was evidently inserted to prevent any withdrawal of the profits by the partners, except the weekly salaries, until the note was paid. It would be very unfair and forced construction of the agreement to construe it to mean that the note was to be paid out of the profits or not at all. Suppose one of the partners had died, or the firm had been dissolved for any reason, and there had been no profits, it certainly could not be held there was no obligation to pay the note.

The agreement refers to the \$5,000 as "a loan." It was to be "a partnership indebtedness and liability."

The position of the claimant under this agreement was that of endorser on a note; he was not a partner. The holder of a note could, at its maturity, have refused to renew it and sued the firm and the endorsers. An endorser who was compelled to pay the note has a claim against the makers."

There were other objections presented in argument and discussed in the appellants' brief, to defeat the Mahon claim, but as these exceptions do not appear to be sustained by the evidence or in harmony with the construction we have placed upon the contract in this case, we do not deem it necessary to consider them.

For the reasons given, the decree of the Circuit Court No. 2 of Baltimore City dated the 3rd of July, 1909, will be affirmed, the costs to be paid by the receivers out of the estate.

*Decree affirmed, the costs to be paid by
the receivers out of the estate.*

CANTON LUMBER COMPANY vs. WM. A. LILLER.

*Inconsistent Instructions to Jury—Measure of Damages for
Breach of Contract to Supply Certain Kinds of Lumber—
Evidence of Statements of Third Party.*

When the question is whether a quantity of lumber, which was sold as being in conformity with certain specifications, was rejected by the inspectors because not in conformity with those specifications, or because not in accordance with the inspectors' view of its fitness apart from the specifications, a prayer instructing the jury that there is no evidence of fraud or bad faith on the part of the inspectors is not in conflict, so as to mislead the jury, with another prayer, instructing them that the inspection should have been made, not in ac-

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cordance with the inspectors' view of the fitness of the lumber for the purpose in hand, but in accordance with the specifications.

A judgment will not be reversed on account of inconsistency between granted instructions unless it be such as may reasonably be supposed to have misled or confused the jury.

In an action to recover damages for breach of defendant's contract to deliver lumber of a designated kind, at a certain time and place, to be used by the defendant in building a coal tiple, etc., for a railway company, the plaintiff is entitled to recover the expenses caused by the delay in getting other lumber in place of that furnished by the defendant and rejected for cause; the increased cost of construction by reason of the necessity of doing the work in the winter instead of in the summer; the freight paid by the plaintiff on the rejected lumber, and the cost of unloading the same. These elements of damage may reasonably be supposed to have been within the contemplation of the parties at the time of making the contract.

Plaintiff bought a quantity of lumber from defendant under a contract which required it to be inspected according to certain specifications by the agent of a third party, for whose structure plaintiff was to use the lumber. *Held*, that evidence of this agent's declarations is not admissible in an action for breach of the contract since he was not the plaintiff's agent.

Decided January 11th, 1910.

Appeal from the Baltimore City Court (DOBLER, J.).

Defendant's 1st Prayer.—If the jury believe from the evidence that the plaintiff entered into a contract with the defendant whereby the defendant was to deliver on cars at the City of Baltimore four hundred and ten thousand feet of lumber, according to certain specifications written upon the blue print offered in evidence, of certain specified lumber which had to be of special sizes and lengths, and which had to be prepared and cut to be used for a special purpose and in conformity with a memorandum of certain sizes and

lengths, and to be used by the plaintiff in the erection of a coal tipple, sand house, etc., which had been specially designed by the Baltimore and Ohio Railroad as described in the evidence, at the round price of twenty dollars per thousand feet, and if planed on one or two sides fifty cents additional per thousand feet, and if planed on three or four sides seventy-five cents per thousand additional, and that the defendant did cut and cause to be prepared the lumber of the dimensions and lengths as mentioned in the revised list furnished by the plaintiff, and loaded the same upon cars at the City of Baltimore and consigned the same to the plaintiff at Keyser, West Virginia, and if the jury shall further find that after the destination of said lumber the same was by the agents of the Baltimore and Ohio Railroad inspected at a higher standard of quality than that laid down upon the blue print specifications offered in evidence, or if the jury shall believe that the B. & O. inspectors inspected the lumber from their own ideas of its fitness for the purposes for which it was to be used, and did not inspect it by the specifications written upon the blue print offered in evidence by which it was sold, then the inspection was not in accordance with the contract of sale, and their verdict must be for the defendant. (*Granted.*)

Defendant's 2nd Prayer.—The defendant prays the Court to instruct the jury that if they believe from the evidence that the plaintiff entered into a contract with the defendant whereby the defendant was to prepare, cut and saw certain specified lumber of certain dimensions and lengths which was intended to be used for a special purpose in the erection of a coal tipple, etc., for the Baltimore & Ohio Railroad at Keyser, West Virginia, as testified to by the plaintiff, and that the defendant did saw and cut the lumber of these dimensions and lengths as required by the revised list delivered by the plaintiff to defendant, and the defendant did load the same on board cars at the City of Baltimore and consign the same to the defendant at Keyser, West Virginia, amounting in the aggregate to four hundred and ten thousand feet, at

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and for the round price of twenty dollars per thousand, and that some of the lumber so cut and delivered was of greater value because of its quality and lengths, and other parts thereof so sawed, cut and delivered were of a lesser value than twenty dollars per thousand, and if they shall further find that upon the destination of the lumber the plaintiff unloaded the same and a part thereof was cut up and used by the plaintiff in the erection of the trestle work (a part of the coal tipple contract with the Baltimore & Ohio Railroad), without the consent of the defendant to such user, that such act on the part of the plaintiff was an acceptance of the whole quantity of lumber shipped and unloaded, notwithstanding upon inspection thereof by the B. & O. inspectors, the whole of said lumber was condemned, then their verdict must be for the defendant. (*Refused.*)

Defendant's 3rd Prayer.—The defendant prays the Court to instruct the jury that if they shall believe from the evidence that the plaintiff entered into a contract with the defendant, whereby the defendant was to deliver on cars at the City of Baltimore, four hundred and ten thousand feet in accordance with certain specifications written upon the blue print offered in evidence, certain specified lumber, which had to be of special sizes and lengths, and which had to be prepared and cut to be used for a special purpose and in conformity with a memorandum of certain sizes and lengths, and to be used by the plaintiff in the erection of a coal tipple, sand house, etc., which had been specially designed by the Baltimore & Ohio Railroad as described in the evidence, at the round price of twenty dollars per thousand, and if planed on one or two sides, fifty cents additional per thousand, and if planed on two or three sides, seventy-five cents per thousand additional, and that the defendant did cut and cause to be prepared lumber of the dimensions and lengths as mentioned in the revised list furnished by the plaintiff, and loaded the same on cars at the City of Baltimore, and consigned the same to the plaintiff at Keyser, West Virginia, and that said lumber did conform to the specifications writ-

ten upon said blue print, and shall further find that the defendant did not sell and agree to deliver the lumber subject to B. & O. inspection, if they shall so find, then their verdict must be for the defendant, notwithstanding the lumber was condemned by the inspectors of the Baltimore & Ohio Railroad. (*Granted.*)

The cause was argued before BRISCOE, PEARCE, SCHMUCKER, BURKE and THOMAS, JJ.

Charles E. Siegmund and James McEvoy, Jr., (with whom were Willis & Homer on the brief), for the appellant.

Alenzo L. Miles (with whom were Wm. E. Ambrose and Luther E. Mackall on the brief), for the appellee.

PEARCE, J., delivered the opinion of the Court.

This is the second appeal in this case, the former appeal being reported in 107 Md., page 146, the defendant below being the appellant in both appeals. At the first trial the case was tried upon the general issue plea, and there was no change in the pleadings at the second trial. The declaration charged that Canton Lumber Company of Baltimore City agreed to sell and deliver to William A. Liller on or before July 1st, 1903, all the necessary lumber for the erection at Keyser, West Virginia, for the Baltimore and Ohio R. R. Co. of an ash pit, coal tipple and sand house, said lumber to conform to specifications set out in the declaration and to be subject to the B. & O. R. R. Co's. inspection; the plaintiff to pay for the lumber at the rate of \$20 per thousand feet: but that the defendant did not deliver lumber conforming to said specifications, nor within the required time, and that the lumber delivered was inspected by the B. & O. R. R. Co. as provided, and was rejected as not complying with said specifications; and that because of said breach of contract the plaintiff was obliged to purchase in open market about 466,837 feet of lumber at a price in excess of that agreed

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upon between the plaintiff and defendant and to incur large additional expense on account of the delay in procuring other lumber, the whole loss to the plaintiff being the sum of \$8,961.21. That trial resulted in a verdict for plaintiff for \$3,350.

In the opinion in the former appeal, the evidence, as it appeared in the record, was set out with much fullness, and the appellee in the present appeal claimed, without contradiction by the appellant, that the evidence was substantially the same at the second as in the former trial. We have compared the records in this respect, and we have discovered nothing in the testimony in the present record which materially altered the presentation of the case.

On the former appeal we found no error in any of the rulings on the evidence, nor in granting any of the plaintiff's prayers, nor in refusing any of the defendant's prayers except its third prayer, which we held ought to have been granted, and the judgment was reversed solely for that error. In this appeal the plaintiff offered five prayers all of which were granted, being literal copies of prayers offered by the plaintiff granted at the former trial, and approved in the former appeal. These prayers are founded upon propositions of law which we still think correct, and are based upon legally sufficient evidence contained in the present record. These may be seen upon reference to the report of the former appeal.

The defendant's first prayer in this case was granted, being substantially its third prayer in the former case which we there held should have been granted. It differs from the third prayer in the former case only in the introductory part, but asserts the precise legal proposition which we held correct in the former appeal and in the language which we there approved, viz: "and if they further find that said lumber was by the agents of the Balto. & Ohio Railroad inspected at a higher standard of quality than that laid down upon the blue print specifications offered in evidence, or if the jury shall believe that the B. & O. inspectors inspected the lum-

ber from their own ideas of its fitness for the purposes for which it was to be used, and did not inspect it by the specifications written upon the blue print offered in evidence by which it was sold, then the inspection was not in accordance with the contract of sale and their verdict must be for the defendant." The sole error which we discovered in the former trial was thus corrected in the second trial.

The defendant's second and third prayers we shall request the reporter to set out fully. Its second prayer though differing somewhat in verbiage from its second prayer in the former case presents the same legal proposition which we considered in the former case, and which we there held to be properly refused, viz, that the use of part of the lumber delivered which did pass inspection was an acceptance by the plaintiff of all the lumber delivered, and we find no reason upon this reargument to alter our view in this regard.

The defendant's third prayer was also granted so that the only ground of objection so far as the prayers are concerned is to the rejection of its second prayer which we have said was properly rejected, and to the granting of the plaintiff's prayers which we have also said were properly granted.

At the argument upon the prayers, Mr. Siegmund of appellant's counsel admitted that if the plaintiff's first prayer, and defendant's first and third prayers had been the only instructions granted, the defendant would have had no cause of complaint, but it was contended that plaintiff's fourth prayer, which instructed the jury that there was no legally sufficient evidence of fraud or bad faith on the part of the B. & O. R. R. Co.'s inspectors, was in conflict both with plaintiff's first, and defendant's first prayer.

It is, of course, error to grant prayers which are inconsistent in theory, and by which therefore the jury must be misled.

This objection was not made on the former appeal, though the case was vigorously contested throughout, and the plaintiff's first and fourth prayers were the same in both cases; and it seems to have been made here as an after thought, the

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granting of the defendant's first prayer in this case having corrected the real ground of complaint in the former case. The fraud referred to in the plaintiff's first and fourth prayers is wilful deliberate fraud, originating in corrupt purpose to make a dishonest inspection, but the jury were distinctly told by the defendant's first prayer that if for any reason, the inspectors mistakenly and incorrectly inspected the lumber by a higher standard than that provided by the blue print their verdict must be for defendant. We can perceive no conflict in the prayers mentioned nor anything misleading to the jury. In *Gary v. Sangston*, 64 Md. 39, JUDGE MILLER said: "Cases may no doubt be found in which this Court has reversed judgments on account of the granting of inconsistent instructions, but an examination of them will show that the instructions were such as to afford good reason for supposing they may have had the effect of misleading or confusing the minds of the jury; but in a case (like this) where there is no reasonable ground for such a supposition, it would be trifling with trial by jury and with justice itself to reverse the judgment and deprive the plaintiffs of the benefit of the verdict."

There were three exceptions to the rulings on the evidence.

When the plaintiff was on the stand he testified that it cost him to purchase in open market the necessary lumber to replace rejected lumber \$2,683.43 over the contract price of the rejected lumber. He was then asked to state just what his other damages, if any were, itemizing them as he proceeded, and objection to that question being overruled the first exception was taken. The objection would seem to have been prematurely taken, but it appears from the record that the testimony which followed, and itemized the elements of damage, was all regarded as subject to exception. The items of damage thus testified to, or the principal items were cost involved in the delay in getting lumber upon the ground in place of the rejected lumber, and increased cost of construction by reason of the necessity of performing the work in the winter instead of the summer; freight paid by the plain-

tiff on condemned lumber, not used, and cost of unloading same. The amount of all these items, the actual cost, was definitely stated—so that the jury was not left at large to indulge in speculation or guess work. The question thus raised therefore is whether these elements of damage may be reasonably supposed to have been within the contemplation of the parties at the time of making the contract. The *general* rule in ordinary cases by vendee against vendor for breach of contract to deliver goods, is that the measure of damages is the difference between the contract price and the market price at the time and place of delivery, but this rule is always subject to modification, where other damage necessarily or proximately incident to the breach of contract, can be held to have been in the contemplation of the parties. *W. U. Tel. Co. v. Lehman*, 107 Md. 448. In the case before us the defendant knew at the time the contract was made for what purpose the lumber was required, and how important it was that the lumber should conform in dimensions and quality with the bill furnished and the specifications provided. The defendant contracted to deliver the lumber by July 1st, but did not complete delivery before the middle of August. After the lumber had been inspected and a large part of it rejected, it required time to purchase and assemble other lumber of the necessary dimensions and quality and the result was that instead of being able to complete the structures during good weather and long working days of summer and fall much of that work was done during the unfavorable weather and shorter days of winter, and on the former appeal we held in granting plaintiff's seventh prayer that the jury might take all these matters into consideration. The plaintiff's fifth prayer in the present case is a transcript of the seventh prayer in the former case and for the reasons stated we are of opinion it stated the correct measure of damages under the circumstances of the case.

The second and third exceptions may be considered together as they both relate to the exclusion of statements made by Mr. Alexander to Mr. Berryman, or conversations be-

tween them. Mr. Berryman was general manager of the defendant and he testified, "that during the inspection he had an interview with Mr. Alexander, who he understood represented the B. & O. and who had come to witness' office and wanted to know where the lumber was that he was to inspect for the coal tipple for Mr. Liller; that witness directed him as requested to the works and that Mr. Alexander made an inspection." Mr. Alexander is not shown to have been an agent of Mr. Liller. He was clearly the agent of the B. & O. to make *its* inspection, an inspection the result of which made in good faith bound both parties to this suit. Alexander was not a party and had not testified in this case; neither was he the plaintiff's agent in making this inspection, and therefore no question arises as to the right of Alexander to bind plaintiff by his statements made out of his presence and hearing. What he *did* in making this inspection the parties were entitled to know, and this the trial judge allowed. To have gone further, and allowed Alexander's unsworn statements to be admitted in evidence would have been to admit mere hearsay, not brought within any of the exceptions to that rule, and there was no error in this ruling.

Judgment affirmed with costs to the appellee above and below.

MARY GRACE CROOK vs. NEW YORK LIFE INSURANCE COMPANY.

Life Insurance—Non-Payment of Premium When Due Causing Policy to Become Paid Up—Authority of Agent to Waive Payment When Due—Insufficient Evidence of Waiver—Tender and Payment Into Court of Amount Admitted to Be Due—Interest.

When the only issues made by the pleading in an action on a policy of life insurance are whether non-payment of a premium when due had been waived by the defendant or not, and whether such non-payment caused the policy to lapse, then evidence as to the physical condition of the insured when the policy was issued, or as to the difference between the policy sued on and other policies and as to similar matters, is irrelevant.

A policy of endowment life insurance provided that if any premium after the first two insurance years is not duly paid, "this policy will automatically become a paid-up insurance" for the amount ascertainable in a specified manner, and also that "a grace of one month during which the policy remains in force will be allowed in payment of all premiums except the first." Held, that under these provisions the failure to pay a premium within one month after it became due reduced the policy in the manner designated unless the insurer waived such non-payment.

The cashier of the local agency of a life insurance company, whose home office is in another State, has no authority to bind the company by waiving the non-payment of premium when due, if the policy provides that a waiver can be made only by certain designated officers.

The acceptance by a local agent of payment of an overdue premium does not operate to waive a forfeiture of the policy on account of non-payment when due, unless the company knew

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or could have known what he had done, and adopted or ratified his act, or by its conduct estopped itself to insist upon a forfeiture.

A life insurance policy provided that only the president, vice-president, actuary or secretary of the company had the power to modify the contract or to extend the time for paying any premium; that premiums might be paid to an agent producing receipts signed by one of these officers and countersigned by the agent; that if any premium be not paid within one month after it became due, the policy should become a paid-up policy for a reduced amount, according to a certain table. It also provided that the insured may secure reinstatement of the policy at any time within five years after non-payment of a premium upon written application to the home office with evidence of insurability satisfactory to the company, and payment of premiums to date of reinstatement. A premium due under this policy on October 5th was not paid, and more than a month afterwards, *i. e.*, on November 7th, the local agent of the company notified the wife of the insured over the telephone that the policy had expired. The insured directed her to say that he would attend to it. To this the agent replied "all right," or "very well." On the same day the insured sent his check for the October premium. The agent sent in reply a receipt, stating that the amount would be held pending the consideration by the home office of an application for reinstatement of the policy, which by non-payment of the premium was not in force except as provided, and also asked for a medical health certificate, with a view to reinstatement of the policy. The insured did not furnish a health certificate, being at the time ill, and the premium so paid was returned to him by direction of the home office. On December 5th the insured died, and afterwards this action was brought to recover the full amount of the policy. *Held*, that under these circumstances there had been no waiver by the company of non-payment of premium when due, and the fact that the illness of the insured made it impossible for him to furnish the health certificate required for reinstatement did not relieve him from that condition.

In an action on a life insurance policy after it had become a reduced paid-up policy on account of non-payment of a pre-

mium, the defendant company filed a plea of tender and paid into Court the cash surrender value of the policy. Before forfeiture, the insured had obtained a loan from the company on the policy and paid interest thereon in advance. *Held*, that when this loan was extinguished, the proportion of interest thereafter unearned was a debt due by the company, and in this action the plaintiff is entitled, under the common counts, to recover that sum in addition to the surrender value of the policy.

Held, further, that the plaintiff is entitled to interest on the sum due not from the death of the insured, but from the time the proofs of death were filed, since under the policy the duty to pay did not arise until receipt of such proofs.

Decided January 11th, 1910.

Appeal from the Superior Court of Baltimore City (HARLAN, C. J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

Frank Gosnell and George Weems Williams, for the appellant.

Edgar Allan Poe, for the appellee.

BURKE, J., delivered the opinion of the Court.

1. This was an action on a policy of insurance issued on the 17th day of May, 1901, by the New York Life Insurance Company on the life of Edward D. Crook, the husband of the appellant, and payable to her on his death as the beneficiary named therein.

Mr. Crook died on December 5, 1907, and this action was commenced on the 11th day of March, 1908. The case was tried in the Superior Court of Baltimore City where a judgment in favor of the defendant for costs was entered, and

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from this judgment Mrs. Crook has prosecuted this appeal.

In the course of the trial in the lower Court, thirteen exceptions were reserved by the appellant; eleven of these relate to rulings on questions of evidence, and two to rulings with respect to prayers which were offered by the parties for instructions to the jury.

In order that the legal questions raised on the record may be clearly understood, and intelligently disposed of, it is necessary to examine the pleadings to see the precise issues raised thereunder.

The declaration contains three counts. The first and second were the common counts, first, for money received by the defendant for the use of the plaintiff; second, for money found to be due by the defendant to the plaintiff on accounts stated between them; and third, a special count on the policy, which alleged the death of the insured; that proofs of his death were duly furnished to and approved by the defendant; that all premiums were duly paid upon said policy according to its terms; and that the death of the insured was not brought about by any of the causes exempted in the policy.

It further alleged that the plaintiff and the insured had obtained a cash loan of \$2,500 from the defendant on the 25th of March, 1907, and that the original policy, according to the requirements of the loan agreement, had been put in possession of the defendant; that the defendant refused to pay the plaintiff the amount of the policy (which the declaration stated to be \$5,000), after deducting therefrom the loan mentioned, and that all things had been done to entitle the plaintiff to receive the money. Attached to the declaration was an account, which charged the defendant, as of February 6th, 1908, with \$5,000, the amount claimed to be due under the policy, and credited it with the sum loaned,—thus leaving \$2,500 as a balance due by the defendant to the plaintiff under the policy. Annexed to the declaration was an affidavit under the *Act of 1886, Chapter 184*.

To the first and second counts of the declaration the defendant pleaded the general issue pleas, and for a third plea

it alleged that by the terms of the policy sued on and particularly mentioned in the third count of the narr, the annual premium of \$550.15 was payable on the 5th day of April in each year, but that subsequently on the 4th day of April, 1903, at the request of the insured and Mrs. Crook, the beneficiary, the premiums were made payable on April 5th and October 5th in each year, said semi-annual payments being \$286.10; it further alleged the making of the loan, as stated in the declaration, and charged that when the semi-annual premium of \$286.10, *due and payable on October 5, 1907*, matured, the insured did not pay said premium, nor did the beneficiary pay the same, and that the policy by reason of said non-payment lapsed, and became null and void, and was never thereafter renewed. These pleas were verified under the Act above mentioned.

The plaintiff joined issue upon the first and second pleas, and for replication to the third plea averred that the insured did pay the premium due and payable on October 5, 1907, and issue was joined upon this replication.

On the day the case was taken up for trial, to wit, May 28th, 1909, the defendant, by leave of the Court, filed an additional plea of tender and payment into Court under *Sections 20 and 21 of Article 75, Code, 1904*. The amount paid into Court was \$523.98, which the plea averred was *sufficient* to satisfy the plaintiff's claim. The plaintiff traversed this plea and issue was joined.

The plaintiff then filed three additional replications to the defendant's third plea which had set up the non-payment of the premium due October 5, 1907. These replications were first, that the payment of the semi-annual premium of \$286.10, due and payable October 5, 1907, when it matured was waived by the defendant; second, that the payment of the semi-annual premium, due and payable October 5, 1907, when it matured was waived by the defendant; third, that the non-performance of the alleged conditions of the policy as set forth in said third plea was waived by the defendant. To these additional replications the defendant filed the com-

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mon traverse upon which issue was joined, and the case proceeded to trial.

It thus appears from the pleadings that there was no dispute that the policy sued on was issued by the defendant and accepted by the plaintiff; that there was no dispute as to the validity of the policy when issued; that originally there was due and payable on the 5th day of April in each year, a premium of \$550.15; that \$2,500 was loaned by the company on the 25th of March, 1907, at the instance of the insured and the beneficiary; that the premiums were subsequently made payable semi-annually on April 5 and October 5, respectively, the half yearly premiums being \$286.10. There was no issue as to the death of the insured, or the cause of death, or the sufficiency of the proofs of death. At an early stage of the trial Mr. John P. Poe, counsel for the defendant, stated to the Court that "the defense simply is: the premium was not paid according to the contract, and the policy thereby lapsed. If we are not sound on that point, that being our only defense, why, of course, our case fails."

We will now take up the rulings of the Court on questions of evidence. These are: (1) The refusal by the Court to allow the plaintiff put in evidence Mr. Crook's application for insurance made in 1901; (2) His refusal to allow the report of the medical examiner on that application to be offered in evidence; (3) The cause of Mr. Crook's death; (4) Its refusal to allow the witness Goldsmith to say what he meant by "liened" and by "his condition," this witness having previously stated that the policy was liened on account of the insured's condition; (5) Its refusal to permit this witness to define a sub-standard policy as distinguished from a regular ten year endowment policy; (6) Or to allow this witness to show that the defendant company refused to issue to Mr. Crook a standard policy, because of his then condition; (7) Or to allow him to prove the amount of the premium on a ten year endowment policy for \$5,000 on the life of a man forty-five years of age, that being the age of Mr. Crook at the time policy sued on was issued; (8) Or to

permit him to show that there was a difference between the premium on the policy sued on and the standard ten year endowment policy; (9) Or to show that the defendant knew at the time it issued the policy that Mr. Crook had Bright's disease; (10) Or that the company knew Mr. Crook's condition at the time it issued the policy; (11) To the action of the Court in striking out certain portions of the testimony of the witness Hunter as to the condition of Mr. Crook's health when the policy was issued, etc.

In our opinion, none of this proffered testimony had any relevancy to the issues made by the pleadings, and all of it was properly excluded. The contract of insurance sued on was issued by the defendant and accepted by the insured. That contract fixed the rights and duties of the parties, and these should not be altered, added to, or dispensed with, or modified by any or all of the facts sought to be proved. The contract alone is the measure of the rights and obligations to the parties thereto, and each had a right to stand upon it, and to insist upon the performance of its terms and conditions. It is the duty of the Court to construe written instruments; but when a contract, which the law does not forbid, has been deliberately and understandingly entered into by parties competent to make it, it is the duty of the Court to uphold it. The introduction of the collateral and immaterial matters which it was proposed to lay before the jury could only have resulted in misleading them and obscuring the real issues of fact raised by the pleadings for their determination.

2. We will now consider the main question in this case: was there a waiver by the defendant of the non-payment of the semi-annual premium due and payable October 5, 1907?

By the true construction of the policy, it was necessary that the insured should pay the premiums according to its requirements, otherwise the policy would become an automatically paid-up insurance under the non-forfeitable features of the policy. This interpretation results from a consideration of a number of the provisions of the policy, all of

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which contemplate the payment of the premium as necessary to prevent the lapsing of the policy.

Two of the stipulations of the policy are as follows: (1) "If any premium or interest due after the first two insurance years is not duly paid, and if there is an indebtedness to the company, this policy will automatically become a paid-up insurance for an amount payable only in the event of death before the end of the accumulation period, and for an amount of cash payable at the end of the accumulation period only, if the insured is then living, such amounts to bear the same proportion to the amount specified in column 2 and column 3, respectively, of the table on the second page hereof, as any excess of the reserve held by the company over such indebtedness bears to the reserve itself." (2) "A grace of one month, during which the policy remains in full force, will be allowed in payment of all premiums, except the first, subject to an interest charge at the rate of five per cent. per annum."

It is admitted that the premium of \$286.10 which fell due October 5, 1907, was not paid when due and payable, and that it was not paid within the period of one month from its maturity as provided by the policy. Under these circumstances the policy ceased to remain in full force and became automatically a paid up insurance in accordance with and for an amount to be ascertained under the provisions of the policy first above quoted, *unless* the defendant waived the non-payment of this premium.

At the conclusion of the whole case the Court instructed the jury by the defendant's first prayer that the plaintiff had offered no evidence legally sufficient to show that the semi-annual premium of \$286.10 on the policy sued on, due and payable on October 5, 1907, was paid on that day, or within thirty days thereafter; or that the non-payment of said premium within said period was waived by the defendant, and the policy sued on reinstated by the defendant, and that, accordingly, by the true construction of the policy sued on, the plaintiff is only entitled to recover such sum as the jury

shall find to be the surrender value in cash of said policy on the day of the death of the assured, Edward D. Crook, to wit, the 5th day of December, 1907, with interest thereon from the 5th day of February, 1908, to the 28th day of May, 1909, and that upon the issues joined on the plea of payment into Court by the defendant, no evidence has been offered legally sufficient to show that such cash surrender value was more than the sum of \$523.98, paid into Court on May 28th, 1909, and that upon said issue the verdict of the jury must be for the defendant.

It is conceded that the premium due October 5, 1907, was not paid, and it is also conceded that the policy was not reinstated, as asserted in this instruction. The first controverted proposition asserted therein is that the plaintiff had offered no legally sufficient evidence that the non-payment of the premium within the period limited was waived by the defendant. A decision upon this question necessarily involves an examination of all the facts in the record relied on by the plaintiff to show a waiver. We have examined the record carefully, and we agree with the lower Court that the evidence is not legally sufficient to show a waiver by the defendant.

The evidence shows that the defendant's home office was located in the City of New York. It was doing business there, and it had a branch office in Baltimore City which was in charge of William A. Gallagher, agency director, and Joseph K. Knott, cashier. But neither of these persons had authority to issue policies or change, alter, or waive any of their terms or provisions. Mr. Knott was authorized to receive renewal premiums, and to deliver receipts executed and furnished to him by the home office. Among the terms and stipulations of the policy sued on are the following: (1) "Only the president, a vice-president, the actuary, or the secretary has power on behalf of the company to make or modify this or any contract of insurance, or to extend the time for paying any premium, and the company shall not be bound by any promise or representation heretofore or here-

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after given by any person other than the above." (2)
"Premiums are due and payable at the home office, unless otherwise agreed in writing, but may be paid to an agent producing receipts signed by one of the above named officers and countersigned by the agent. If any premium is not paid on or before the day when due, or within the month of grace, the liability of the company shall be only as hereinbefore provided for such case."

These provisions constituted a part of the policy, and Mr. and Mrs. Crook were chargeable with notice of them, and it cannot be doubted that under these provisions Mr. Knott, the cashier, had no power or authority to waive any of the provisions of the contract. Nor is it pretended that such authority was ever delegated to him by the defendant, or that there was anything in the course of his dealings between him and the insured to lead to the belief that he had such authority. or that in fact he ever assumed to exercise it. Under such circumstances, what was said by this Court in *Busby v. The North American Life Insurance Company*, 40 Md. 583, is conclusive against any power in Mr. Knott to waive the non-payment of the premium. In that case JUDGE ALVEY said: "The principle seems to be well settled, that where the authority of the agent does not extend to making a new contract of insurance, he cannot waive a forfeiture and revive a contract that has expired. This question is decided in a well considered case in the Supreme Court of Connecticut, where it was held, in an action on a life policy which declared that it was not to be binding until countersigned by the agent, and delivered and the advanced premium paid, and these were the only words expressive of the agent's authority, that he was not authorized to accept a subsequent premium after the time at which the policy expired by reason of the non-payment of such premium at the proper time. *Bouton v. The American Mutual Life Insurance Company*, 25 Conn. 542. The Court, in the course of its opinion in that case, said: 'We think that he (the agent) was not empowered to receive any premium which was not paid according to the

requirements of the policy, that is in advance. That instrument was his sole guide in regard of what he should do under it. The contract was made by the defendants, and not by him, excepting in the capacity of their agent; he was not authorized to alter or vary it, or depart in any respect from it, or dispense with the fulfillment of its conditions by the insured, or discharge it, or revive it after it had by its terms ceased to be obligatory on his principal, by waiver of a compliance with its provisions or otherwise. These must be done by the parties to the contract. He was only authorized to act in pursuance of it, and then so far only as it gave him authority. He could exercise only the power delegated to him, and no power is delegated to him to depart from the terms of the policy. It is surely not necessary to cite books to show that an agent, authorized only to execute a contract in behalf of one of its parties, has no power to vary it or dispense with its execution by the other, or that one authorized by a person to receive a payment of a sum of money from another on and in pursuance of a conditional contract, which requires such payment to be made at a specified time, is thereby empowered to authorize or waive a breach of such condition.' The question is also very fully considered in the case of *Catoir v. The American Life Insurance and Trust Company*, 33 N. J. R. 487, and decided in the same way. The fact that the agent held a receipt of the appellee, transmitted to him from the home office, regularly executed, and only requiring to be countersigned by him to enable him to receive the money due on the policy, has been much relied on as evidence of authority in the agent to receive the overdue premium, and waive the forfeiture. But that fact must be taken in connection with the regular course of dealing between the home office and the agent, as shown by the appellant's evidence, and also, in connection with what is expressly provided for on the face of the policy. It is not to be presumed that the receipt was transmitted to the agent to be used by him in any other manner than as required and authorized by the policy."

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If, therefore, it be assumed that Mr. Knott did in fact attempt to waive the non-payment, his act would not bind the defendant, unless the company knew, or could have known what he had done, and adopted or ratified his act, or by its acts or conduct had *estopped* itself to insist upon the consequences of the non-payment. *Baltimore Life Insurance Company v. Howard*, 95 Md. 244. But as we understand the evidence, Mr. Knott did not do or intend to do any act beyond the scope of his power, nor were any of his acts inconsistent with the purpose to insist upon the terms and conditions of the policy. On the contrary, everything done by him is consistent with the maintenance in full force of all the provisions of the contract. This conclusion rests upon the following facts appearing in the record. The contract of insurance contained this stipulation: "The insured may secure reinstatement of this policy during the accumulation period at any time within five years after the non-payment of any premium, under the following conditions: *written application to the home office with evidence of insurability satisfactory to the company*; payment of premium from the date to which premiums were duly paid to the date of reinstatement, with interest at the rate of five per cent. per annum, and payment or reinstatement of any loans, including payment of any interest due and unpaid."

The premium due October 5, 1907, not having been paid at maturity, Mr. Knott wrote to Mr. Crook on the 22nd of October, 1907, calling his attention to the fact, and informing him that "the period during which this payment will be accepted, without other requirements than interest at the rate of five per cent. per annum from above date (October 5, 1907), expires on November 5th." No answer was received to this letter, and on November 5, 1907, the policy lapsed, and became a paid-up insurance under the contract, and could only be reinstated in full force under the reinstatement clause above quoted.

On November 7th, Mr. Knott called up Mr. Crook's home, and according to the evidence of Mrs. Crook, which is most

favorable to the plaintiff, and in some material respects different from that of Mr. Knott, told her to tell Mr. Crook that his life insurance had expired. She called to her husband, and said "Ed., do you know your life insurance has expired. He said, I have thirty days, tell him. The party holding the receiver said, that has expired two days. Then my husband said, tell him I will attend to that. I did. Then the party said all right and rang off." She afterwards said the reply was "all right, or very well." It would be a most violent and unreasonable construction of such a response, uttered under these circumstances, to hold that it was intended as a waiver, or that a waiver could be deduced from it, especially in view of all the subsequent facts it clearly appears no such result was intended by Mr. Knott. Moreover, as we have seen, Mr. Knott had no authority to waive the non-payment, and it is not pretended that the company ever had or could have had knowledge of this conversation, and, therefore, was not bound by it, if it really occurred precisely as given by Mrs. Crook.

Later in the day of November 7th, Mr. Crook sent his check for the October premium and interest to Mr. Goldsmith, an agent of the defendant, in which he asked him to accept it in payment of the premium, stating that he had always been prompt in paying his premiums and saying that he "would kindly ask your indulgence in this instance." This letter was received by Mr. Goldsmith on the following day, and both the letter and check were turned over to Mr. Knott. Mr. Goldsmith replied to this letter on the 8th acknowledging the receipt of the check, and stating that the "matter will be taken up by me at once with a view of having your insurance *reinstated*," and on the same day Mr. Knott wrote the following letter to Mr. Crook: "We are in receipt of your favor of the 7th instant, enclosing check for \$287.33, tendered in settlement of passed due October 5th premium and grace interest, and as this amount was received after the expiration of grace allowed you in settlement of premium had expired, we kindly ask that you furnish us with medical

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health certificate by our Dr. Owings, without expense to the company, for reinstatement of your policy. We enclose you herewith receipts in duplicate for the amount tendered." The receipts mentioned in the letter were called receipts for deposit with application for restoration of policy, and contained among other things the following: "Received in Baltimore, State of Maryland, this 8th day of November, 1907, from E. D. Crook the sum of two hundred and eighty-seven 33/100 dollars, *which is held pending the consideration by the New York Life Insurance Company at its office of issue*, of an application for restoration of policy No. 2073082, on the life of E. D. Crook, which policy, by the non-payment of premium due on October 5, 1907, is *not in force* except as provided by the non-forfeiture features of said policy."

Mr. Knott placed this check in the Merchants National Bank to the credit of the home office account, which was subject to draft direct from New York, and sent a deposit slip to the home office. Hearing nothing from Mr. Crook, and the conditional receipt sent to him for his signature not being returned, Mr. Knott wrote to him on the 16th of November stating that he had not received the medical certificate asked for on the 8th instant. This letter was replied to on November 19th by Mr. Kries, who stated that Mr. Crook was not at his office, and that he would answer it as soon as he returned. On November 23rd, Howard E. Crook, a son of the insured, wrote to Mr. Knott stating that his father was confined to his bed by sickness, and would not be able to give a health certificate, and expressing the hope that he "would overlook this negligence this time." Mr. Crook was then in no condition to attend to business and had not been for some time. On the 26th of November Mr. Knott wrote the following letter to Mr. Anderson, the comptroller of the defendant company: "Under date of November 8th, we received settlement for October 5th premium with interest under this policy, and placed same in suspense account pending health certificate for reinstatement. We enclose you herewith the letters received together with our replies, which are self

explanatory. At the time remittance was received, we understand that Mr. Crook was not very well, which explains why we ask for medical certificate instead of the self-health certificate. Attached to the letters you will find clippings which we cut from the Baltimore Evening News of the 25th instant, regarding Mr. Crook's illness."

This letter was referred by the comptroller to the renewing department of the company for its consideration, and on November 30th Mr. Knott was directed by the comptroller to refund the premium reported on the 8th instant. He thereupon promptly sent to Mr. Crook a check for the amount. After the death of Mr. Crook, the check was returned to Mr. Knott by counsel for the appellant. Upon these facts it is claimed that there was a waiver by the defendant. But we think it is obvious that the check was received by Mr. Knott not in payment of the premium, but was received by him and retained by the company conditionally, awaiting the medical certificate of insurability referred to by Mr. Knott in his letter to Mr. Crook of November 8th, or, as stated by him in his letter to Mr. Anderson, "pending health certificate of reinstatement." Under such circumstances a waiver cannot be inferred. All the letters of Mr. Knott indicate a well defined purpose to avoid a waiver.

The doctrine of waiver has been definitely settled by many adjudicated cases in this Court and elsewhere, among which are the well considered cases of *Insurance Company v. Norton*, 96 U. S. 234; *Monahan v. Mutual Life Insurance Company*, 103 Md. 145; *Baltimore Life Insurance Company v. Howard*, *supra*. To establish the waiver the plaintiff was bound to prove acts, declarations, or conduct on the part of the insurer inconsistent with the intention to insist upon a performance of the conditions of the policy. Such evidence would show a waiver or an estoppel upon the defendant. It was upon these grounds, and upon facts essentially different from those disclosed by this record, that the Insurance Companies were held liable in the *Howard and Monahan Cases*, *supra*.

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It is said that by reason of the sickness of Mr. Crook he did not receive some of Mr. Knott's communications. But that does not affect the question here. Some of them were sent to his place of business, and ought to have been received by him promptly. It is also said that Mr. Crook was sick, and could not furnish the health certificate demanded by the company, and that the company was trifling with him when it insisted upon evidence of insurability as a condition of restoration of his policy. But the answer to this is that the contract provides that this shall be done before the policy shall be reinstated. It is unfortunate that Mr. Crook should have permitted his policy to lapse, but if the company does not see fit to "overlook this negligence" this Court has no power to require it to do so. It has an undoubted right to stand upon the terms of the contract.

3. Had there been no loan and no question of unearned interest in the case, we would not hesitate to approve the remaining portion of the defendant's prayer, because in the absence of such conditions, we agree that by the true construction of the policy the plaintiff could only have recovered such sum as the jury found to be the full surrender value of the policy on the day of the death of the insured with interest from February 5th, 1908, to May 28th, 1909, that being the date of the tender and payment into Court. Upon the facts contained in the record, it appears that the sum of \$523.98 paid into Court was the full surrender value of the policy with interest; but it was error to have instructed the jury that upon the issues joined upon the plea of payment the defendant was entitled to a verdict. The issue raised upon that plea was whether the sum tendered was *sufficient to satisfy the plaintiff's claim*, and if the defendant owed any other sum the plaintiff was entitled to recover it under the first count in the narr. The fact of the tender of the cash surrender value of the policy did not entitle the defendant to a verdict, if there was evidence tending to show that another and additional sum was due and recoverable under the declaration. The evidence showed that Mr. Crook paid the sum

of \$125 as interest on the loan in advance to April 5, 1908. The policy lapsed on November 5, 1907, the loan then became due and payable according to the loan agreement, and the policy pledged as security was foreclosed by the company on December 19, 1907. The loan was then extinguished, and no interest thereafter could have accrued, and the proportion of interest from that date held by the company should have been refunded. That unearned interest is money held by the defendant for the use of the plaintiff and was recoverable, with interest from December 19, 1907, under the declaration. *MoSherry v. Brooks*, 46 Md. 103; *Laubheimer v. Nail*. 88 Md. 174; *Councilman v. The Bank*, 103 Md. 469.

It was contended that the prayer is also erroneous, because the interest should have been calculated, not from February 5, 1908, but from December 5, 1907, the date of Mr. Crook's death. But we cannot agree to this contention, because by the express terms of the policy the duty to pay only arose upon the receipt and approval of the proofs of death, which were sent to the company on February 5, 1908, and presumably was received by it on that day, or on the day following. *Palatine Insurance Company v. O'Brien*, 107 Md. 356.

It follows that there was error in granting the defendant's prayer, and that substantial injury was thereby done the plaintiff. Upon the facts contained in this record we decide, first, that there was no waiver by the defendant, and no evidence tending to prove a waiver; second, that the plaintiff at the trial below was entitled to have recovered \$523.98 plus the unearned interest, with interest upon that sum from December 19, 1908. It is unnecessary to discuss the plaintiff's prayers, as they are all based upon the theories of the case in conflict with the views we have expressed, and were properly refused.

Had there been no reversible error in the defendant's prayer, we would decide that "judgment for defendant for costs" was properly entered. We need not discuss this entry further, as the propriety of such a judgment, when the jury

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finds for the precise amount tendered and paid into Court, has been definitely settled in *Palatine Insurance Company v. O'Brien*, 109 Md. 111.

Judgment reversed with costs above and below, and new trial awarded.

WOODBURN TOOMER vs. THE STATE OF MARYLAND.

Indictment for Sending Threatening Letter to Extort Money—Statement of Name of Person Threatened—Variation Between Counts of Indictment—Evidence—Confession Held to Be Voluntary—Remarks to Jury of Prosecuting Officer—Instruction to Jury—Cruel and Unusual Punishment.

By Code, Art. 27, sec. 395, it is provided that any person who shall send or deliver, with or without signature, any letter threatening to accuse any person of an offense, or do injury to the person or property of anyone, with intent to extort money, etc., shall be guilty of a felony, etc. *Held*, that in an indictment under this statute, it is not necessary that the name of the person to whom the threatening letter was sent should be set forth in it.

When it appears that the several different counts of an indictment relate to the same transaction, and that the form in which the offense is charged was varied in order to meet the possible evidence, the indictment is not obnoxious to the objection that each count charges a distinct offense.

Upon the trial of an indictment, a witness for the State cannot be asked whether anybody other than the defendant was under suspicion, since that is wholly irrelevant to the question of the guilt or innocence of the accused.

When a threatening letter sent to extort money is set out in the indictment and the letter as offered in evidence shows a variation as to the spelling of a word, that is not a variance, when the meaning of the word is not thereby changed.

The deputy sheriff who arrested the accused did not inform him of the charge, but took him to the office of the State's Attorney before taking him to jail or to a committing magistrate. The State's Attorney said to the accused that he was not obliged to answer questions, and anything he might say would probably not be to his advantage, but might be used against him. *Held*, that a confession then made by the accused in reply to questions was voluntary and admissible in evidence, since it was not extorted by threats or inducements.

Upon the trial of an indictment, charging the accused with having sent a letter threatening to burn the buildings of a certain person unless money be paid to him, the State's Attorney, in addressing the jury, said: "Fires have occurred in this county, buildings have been burned, and it was my duty to act in this matter." *Held*, that the refusal of the trial Court to require the State's Attorney to retract that statement is not a reversible error.

After the jury in a criminal case had returned to their room to consider of their verdict, the foreman sent a note to the trial judge asking if they should consider the prisoner's confession. The judge replied that the testimony concerning the confession was a part of the evidence which the jury was at liberty to consider. *Held*, that this instruction was correct, and did not suggest to the jury that they should consider the evidence of the State to the exclusion of the testimony of the defense, or that it was entitled to more weight.

The sentence of ten years in the Penitentiary imposed upon a prisoner convicted of threatening to burn a man's buildings unless money be paid to him is not a cruel and unusual punishment, the statute authorizing that offence to be punished by confinement in the Penitentiary for not less than two nor more than ten years.

Decided January 14th, 1910.

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Opinion of the Court.

Appeal from the Circuit Court for Harford County (VAN BIBBER, J.).

The case was submitted to the Court on briefs by:

Harry S. Carver, for the appellant.

Isaac Lobe Straus, Attorney-General, for the appellee.

THOMAS, J., delivered the opinion of the Court.

The appellant was indicted, tried and convicted under section 395 of Article 27 of the Code, and was sentenced to the penitentiary for the period of ten years. There was a demurrer to the indictment and to each count thereof. The section of the Code referred to provides that "Every person who shall knowingly send or deliver, or shall make, and, for the purpose of being delivered or sent, shall part with the possession of any letter or writing, with or without a name subscribed thereto, or signed with a fictitious name, or with any letter, mark or other designation, threatening therein to accuse any person of any crime of an indictable nature under the laws of this State, or of anything, which, if true, would bring such person into contempt or disrepute or to do any injury to the person or property of anyone, with a view or intent to extort or gain any money, goods or chattels or other valuable thing shall be guilty of a felony, and being convicted thereof shall be punished by imprisonment in the penitentiary for not less than two nor more than ten years."

By this section it is made a felony to either knowingly send, deliver or make and, "for the purpose of being sent or delivered,—part with the possession of any letter or writing," etc., threatening therein "to do any injury to the person or property of anyone with a view or intent to extort or gain any money, goods or chattels or other valuable thing."

The first count in the indictment charges that the accused "feloniously did knowingly send a letter without a name subscribed thereto to one A. Henry Strasbaugh in said coun-

ty, by the name and description of Strosbough threatening therein to do an injury to the property of said A. Henry Strasbaugh with a view and intent to extort and gain money from him said A. Henry Strasbaugh, and which letter is as follows, that is to say: 'Strosbough you are requested to leave at this certain place one hundred dollars in small paper money in a small box at the cross roads from Creswel to the Blair pike back of the old tree with the dop out this is to be put there by three o'clock Wednesday, Nov. 25th, and if not there by that time your buildings will all go up in smoke when you least expect it this is to be left there until taken away you will not be warned but once if this is not complied with this will happen.' The second count charges that he "feloniously did knowingly *deliver*" said letter to A. Henry Strasbaugh, as in the first count; the third count charges that he "feloniously did knowingly make and part with the possession of" said letter "for the purpose of being *delivered*" to A. Henry Strasbaugh, etc., and the fourth count charges that he "feloniously did knowingly make and part with the possession" of said letter "for the purpose of being *sent*" to A. Henry Strasbaugh, etc.

The ground of the demurrer is that the letter does not contain the name of A. Henry Strasbaugh, and the contention of counsel for the appellant is that the prosecuting witness could not, therefore, know that it was intended for him. But if it was sent or delivered to him, or if the accused made and parted with the possession of it for the purpose of having it sent or delivered to him, it obviously can make no difference whether his name is in the letter or not. Suppose the appellant had placed the letter, without any name in it at all, in Mr. Strasbaugh's house where he knew it would be received by him, would not the legitimate inference be that it was intended for him? The means by which such a letter or writing is delivered is immaterial, provided it contains a threat to injure the person or property of the one to whom it is delivered for the purpose mentioned in the statute, and if the letter set out in the indictment was delivered or sent by

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the accused, or he made and parted with the possession of it for the purpose of having it sent or delivered to A. Henry Strasbaugh, there can be no question of his guilt under the provisions of the Code. The case of *State v. Nutwell*, 1 Gill, 54, presented an entirely different question. There the accused was indicted under a statute forbidding any person accustomed to make and sell distilled spirits or other liquors, "to suffer any free negro or mulatto, or any negro or mulatto servant or slave to be in her or their storehouse, or other houses, wherein he, she or they may be accustomed to sell distilled spirits or other liquors between sunset in the evening and sunrise on the succeeding morning," and the Court held the indictment bad because it did not state the *name* of the slave whom the accused suffered to be in his storehouse, etc., and did not, therefore, sufficiently describe the offense with which the accused was charged.

The demurrer having been overruled, the prisoner moved to quash the indictment on the ground that it contains four counts, each charging a separate and distinct offense. It is the common and approved practice in this State to insert in the indictment several counts, charging the offense in different ways, and to charge in one indictment, in separate counts, two or more felonies growing out of the same transaction. For instance, there may be several counts for larceny, charging the ownership of the property in different persons, and it is usual to have in the same indictment a count for larceny and another for receiving stolen goods. Where there are several counts in the indictment, charging *separate and distinct* offenses, the Court may, in its discretion, require the prosecution to elect upon which count he will proceed, or quash the indictment. That should not be done, however, at the instance of the accused, unless the Court can see that "the charges are actually distinct and may confound the prisoner, or distract the attention of the jury." But the indictment will not be quashed, where it is obvious on its face, "that the several counts relate to the same transaction, and that the variation of the form in which the offense is charged

in the different counts is done with a view to meet the evidence." Now while the statute in question makes it a felony to either send, deliver or make and part with the possession of such a letter or writing for the purpose of having it delivered or sent, it is apparent that the several counts in the indictment relate to the same transaction, and do not charge separate and distinct offenses, and that the motion to quash the indictment was properly overruled. *Wheeler v. State*, 42 Md. 563; *State v. McNally*, 55 Md. 559; *Stearns v. State*, 81 Md. 341; *Hochheimer's Crim. Law & Proc.*, sec. 162; 22 *Cyc.* 394; 1 *Bishop's New Crim. Proc.*, secs. 449-451.

Arthur Hansom, a witness for the State, testified that he was a clerk in A. H. Strasbaugh's store at Creswell, Harford County, Maryland, and that he has known the appellant for about four years; that after the letter set out in the indictment was found, he got the accused to write a letter for him, for the purpose of securing a sample of his writing, and he then produced and identified the note. On cross-examination he was asked the following question: "Was anybody else other than the defendant under suspicion?" The State objected, the Court refused to allow the question to be answered, and the defendant excepted. The purpose of this question is not disclosed by the record, but the fact that other persons were "under suspicion" could not have reflected in any way upon the question of the guilt or innocence of the accused, or have tended to contradict the witness.

Mr. Strasbaugh testified that on the 25th of November, 1908, he found the letter referred to in the indictment on his barn door, "about three or four feet from the ground, about eight o'clock in the morning," and that it was not there at dusk the evening before. The State then offered the letter in evidence, the defendant objected, and the second exception is to the action of the Court in allowing the letter to be read to the jury. The ground of this exception, as stated in the appellant's brief, is that there is a variance between the letter set out in the indictment and the letter read to the jury; that in the indictment, the letter contains the

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word "unbinond," while in the letter offered in evidence it is "unbenonce," and he relies on the statement in *Wharton's Am. Cr. Law* (2 ed.), page 123, that "A mere variance of a letter will not be fatal, even when the tenor is set out, provided the meaning be not altered by changing the word misspelt into another of a different meaning." In the letter it is stated that the money must "be put there unbenonce to anyone but yourself," while in the indictment the money must "be put there unbinond to anyone but yourself," and there is no change in the meaning of the word, which was a substitute for *unbeknown*, and it is not, therefore, a fatal variance under the authority referred to.

The next exceptions are to the admission of the testimony of the deputy sheriff, Thomas Forsythe, and J. Royston Stifler, the State's Attorney for Harford County, to a confession made by the accused in their presence. The deputy sheriff testified that he arrested the defendant at Fountain Green, Harford County; that when he arrested him defendant said "What am I arrested for?" To which witness replied: "You will find out when you get to Bel Air;" that he, witness, did not tell the defendant what he was arrested for, nor did he read the warrant to him or show it to him; that he took the defendant to Bel Air and went with him direct to the State's Attorney's office before taking him to jail or before a committing magistrate; that no conversation took place between the witness and defendant or between the State's Attorney and defendant, except in witness' presence; that witness, State's Attorney and defendant were the only ones present in State's Attorney's office; that defendant wasn't told that he was entitled to be represented by counsel; that witness can't remember first thing that was said after entering State's Attorney's office; the defendant was informed that he did not have to answer any questions and was told that anything he might say would probably not be to his advantage but might be used against him; that no inducements were held out or promises made to him to induce him to make any statement." Mr. Stifler, the State's Attorney, testified

that the deputy sheriff brought the defendant to his office in Bel Air; "that before talking to defendant witness said to him that he did not have to answer any questions and was told that anything he might say would probably not be to his advantage but might be used against him; that no inducements were held out or promises made to induce him to make any statement."

It is the undoubted and well established rule that before the confessions of the accused are admitted, the Court must be satisfied that they were free and voluntary, and were not "procured by the influence of another under the hope of favor or advantage if made, or fear of harm or disadvantage of some kind, if withheld," and it is equally as well settled that where they were freely and voluntarily made, without any inducements having been offered or threats made, they are admissible. Now the testimony of the deputy sheriff, in whose custody he was from the time he was arrested until he made the confession in the State's Attorney's office, and the testimony of the State's Attorney, is to the effect that no inducements of any kind were offered or promises made, and that the prisoner was told that he was not obliged to answer any question, and that anything that he said would probably not be to his advantage and might be used against him. Without meaning to approve of the method by which the confession of the appellant was obtained, a confession made under such circumstances was clearly admissible. *Nicholson v. State*, 38 Md. 140; *Ross v. State*, 67 Md. 286; *Biscoe v. State*, 67 Md. 6; *Rogers v. State*, 89 Md. 424; *Young v. State*, 90 Md. 579; *Green v. State*, 96 Md. 384; *Birkenfeld v. State*, 104 Md. 253.

The next exception is to the refusal of the Court to require the State's Attorney to retract the following statement made by him in his concluding argument to the jury, "Gentlemen of the jury, fires have occurred in this county, buildings have been burned, and it was my duty to act in this matter." It is unquestionably wrong for the State's Attorney in his argument to the jury to refer to any matter not testified to

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by the witnesses or disclosed by the evidence in the case, and it is his duty to confine his remarks to the facts in the case. but if every remark made by counsel in the heat of argument, not strictly applicable to the evidence offered, is to be held sufficient ground for reversing a judgment, few convictions would stand. The remarks to which objection was made were simply a statement by the State's officer of his reason for taking action in the case before the jury, and was not a statement of any fact outside of the evidence in the case as a reason for or argument in favor of the conviction of the accused. In the absence of something to show that the jury was misled or influenced to the prejudice of the prisoner by such remarks the lower Court would not have been justified in setting aside the verdict, nor would this Court be warranted in reversing the judgment appealed from. In the case of *Dunlop v. The United States*, 165 U. S. 486, the Court said: "If every remark made by counsel outside of the testimony were ground for a reversal, comparatively few verdicts would stand, since in the ardor of advocacy, and in the excitement of trial, even the most experienced counsel are occasionally carried away by this temptation." See also *Esterline v. State*, 105 Md. 629.

After the jury had retired to their room, the foreman sent the following note to the Court: "Your Honor—Should we consider Toomer's confession before State's Attorney? As one lawyer said his confession amounted to nothing unless the intent was carried out, that is, unless the buildings were burned.

G. W. McComas, Jr., Foreman."

The Court sent the following reply: "The statements made by the State's Attorney and Mr. Thomas Forsythe under oath are a part of the evidence before you and you are at liberty to consider them in reaching a verdict.

GEO. L. VAN BIBBER."

And the seventh exception is to this statement in writing to the jury. In this State the Court is not required to in-

struct the jury, but may do so, and if the instruction is erroneous, and the jury have followed the instruction to the injury of a prisoner he is entitled to have the judgment reversed on appeal. *Forwood v. State*, 49 Md. 531; *Swan v. State*, 64 Md. 423. But we can see no objection to the instruction given by the Court in this case. The note of the foreman contained this inquiry: "Should we consider Toomer's confession before State's Attorney," and then followed the statement: "As one lawyer said his confession amounted to nothing unless the intent was carried out, that is, unless the buildings were burned." The reply of the Court did not answer the inquiry as to whether the jury should consider Toomer's confession before the State's Attorney, but simply stated that the statements made by the State's Attorney and the deputy sheriff under oath were a part of the evidence before the jury, and that they were entitled to consider them in reaching a verdict. There can be no doubt as to the correctness of this instruction, and it did not, as contended by counsel for the appellant, suggest to the jury that they should consider the evidence of the State to the exclusion of the testimony of the defendant, or that it was entitled to more weight.

The only remaining ground on which the appellant claims the judgment below should be reversed is that it constitutes cruel and unusual punishment. The statute provides that any person convicted of the offense charged in the indictment shall be punished by confinement in the penitentiary for not less than two, nor more than ten years. In the case of *Mitchell v. State*, 82 Md. 527, the Court said: "Our law inflicts pain not in a spirit of vengeance, but to promote the essential purposes of public justice. Severity is not cruelty. The punishment ought to bear a due proportion to the offense. Crimes of great atrocity ought to be visited with such penalties as would check, if not prevent, their commission. It is impossible in the abstract to mark the boundaries which separate cruelty from just severity." In that case the defendant was convicted of an attempt to carnally know and abuse a woman-child under the age of fourteen

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years, and was sentenced to imprisonment in jail for the term of fifteen years. In the case of *Lanasa v. State*, 109 Md. 605, the defendant was convicted of a conspiracy to wilfully and maliciously injure and destroy the property of one Joseph Di Giorgio, and was sentenced to confinement in the Baltimore City jail for the term of ten years, and this Court held that while the sentence was severe it was "not open to the objection of being in the sense of the law cruel or unusual."

It appears from the evidence that the prisoner stated that he also sent a similar letter to Mr. Kirkland. In imposing sentence, the Court must take into consideration the nature of the offense, and the circumstances attending the commission of the crime, and inflict such punishment as will tend to prevent a repetition of it. While, as was said in *Lanasa v. State*, the sentence imposed in this case may be severe, it cannot, in view of the nature of the offense, be regarded as unusual or cruel, and we must, therefore, affirm the judgment of the Court below.

Judgment affirmed.

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Syllabus.

BALTIMORE AND OHIO RAILROAD COMPANY
vs. BENJAMIN M. DEVER.

*Carriers—Liability for Exposing Cattle to Infectious Disease—
Pleading—Legal Sufficiency of Evidence of Carrier's Neg-
ligence in Not Protecting Cattle from Texas Fever—
Evidence—Hypothetical Question—When Testi-
mony in Chief Under Deposition Not Ad-
missible, Cross-Examination Also
Not Admissible.*

A declaration charging that the defendant carrier, a railroad company, negligently permitted the cars in which it transported cattle for the plaintiff, and the pens and yards in which the cattle were fed, to become dirty and infected with germs of disease by which the cattle became infected, is sufficiently definite, and a demurrer thereto was properly overruled.

A plea to such declaration averring that the claim of the plaintiff was based on regulations promulgated under an Act of Congress concerning the shipment of cattle, and that said Act is unconstitutional, is bad on demurrer, since the declaration is based not on the Act of Congress, but on the common law rights and liabilities of the parties.

The carrier of live animals is not liable as an insurer for death or injury to cattle caused by a disease to which they were exposed during the shipment, but is only liable for negligence in exposing them to such disease.

Certain cattle carried by the defendant for the plaintiff in two shipments from Missouri to Maryland were found, soon after delivery, to be infected with a disease called Texas fever. In an action to recover damages therefor, under a declaration charging that the infection was caused by the defendant's negligence during the transportation, the evidence on the part of the plaintiff showed that the cattle in both shipments were certified by Government inspectors to have been in good

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health when first shipped; that they were unloaded at the B. yards to be fed and rested, and reloaded in the same cars for further transportation to the place of delivery; that at these yards the cattle were placed in pens used only for animals not coming from an infected territory, which pens were separated from the quarantine pens by an alley twenty feet wide, and also by a dead alley, ten feet wide; that there was a board fence between the two alleys, with an inch space between the planks, and a wire fence between the pens where these cattle were placed, and the dead alley. There was also evidence that Texas fever is caused by fertilized female ticks which, upon dropping off from infected cattle, deposit their eggs on the ground; that after these are hatched into larvæ, they crawl on other cattle and produce the infection by their bite; that these ticks cannot crawl far, but may be carried a long distance by the wind, by other animals, or on the clothing of men; that the proper precaution against infected cattle should be a stone wall or an absolutely tight board fence, six feet high, and that there should be no communication by animals between the quarantine pens and others, as the tick can pass through a small crevice; that the disease was developed in plaintiff's cattle within about the period required for development after leaving the B. yards, and the expert evidence was to the effect that plaintiff's cattle had been infected at these yards. *Held*, that the evidence is legally sufficient to be submitted to the jury to show that the defendant had been negligent at these yards in not taking proper precaution to guard the cattle of plaintiff while there from the danger of infection from the quarantine pens.

When the testimony taken in chief under a deposition is rejected, then the cross-examination on that subject is not admissible at the instance of either party.

When the evidence produced by the plaintiff to show that the defendant negligently exposed plaintiff's cattle to infection by disease at a certain place is not clear and conclusive, the admission of incompetent evidence to show that other cattle subsequently became infected at that place is reversible error.

A hypothetical question put to a veterinary surgeon is erroneous when it assumes that healthy cattle were placed in pens separated from quarantine pens by one alley and a fence not abso-

lutely tight, while the evidence shows that between the two pens there was another alley; and when the question also assumes that the cattle were reloaded from the yards upon cars other than those in which they were carried to it, while in fact they were reloaded in the same cars.

Evidence that Government inspectors were mistaken in certifying that certain cattle were free from disease is not admissible when the question is whether they had given an erroneous certificate in regard to other cattle a year previous.

Decided January 13th, 1910.

Appeal from the Circuit Court for Harford County (VAN BIBBER, J.).

Plaintiff's 10th Prayer.—If the jury find for the plaintiff, the measure of damages is for the cattle that died, the market value at the place of destination, and for those that were diseased and did not die, the difference between their market value at same place at the time when they arrived there if they had not been diseased, and what they were worth after they were cured or got well of the disease, and such additional expenses and losses as were necessarily imposed on the plaintiff by the injuries caused by the disease to said cattle, and directly attributable thereto. (*Granted.*)

All the other prayers offered by the plaintiff were refused.

Defendant's 1st Prayer.—There is no evidence of negligence in this case legally sufficient to entitle the plaintiff to recover and their verdict must be in favor of the defendant. (*Refused.*)

Defendant's 4th Prayer.—To entitle the plaintiff to recover under the pleadings in this action there must be evidence tending to prove either: First, That there were Texas fever ticks in the native yards at Belpre; or, second, that there were such ticks in the cars in which the plaintiff's steers were carried; and the jury may not in the absence of other proof, infer that there were ticks in said yards either: First, because Southern cattle were handled at the quarantine

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yards; or, second, because there was not a tight board fence between the so-called dead alley and the native yards; or, third, because the steers began to die on the 11th of September; or, fourth, for two or more of said reasons together; fifth, nor may they infer there were ticks in said cars because the said steers began to die on said 11th day of September in the absence of other proof of said facts. (*Refused.*)

Defendant's 5th Prayer.—To entitle the plaintiff to recover under the pleadings in this action there must be evidence tending to prove, either: First, that there were Texas fever ticks in the native yards at Belpre; or, second, that there was such ticks in the cars in which the plaintiff's steers were carried; and the jury may not, in the absence of other proof, infer that there were ticks in said yards either: First, because Southern cattle were handled at the quarantine yards; or, second, because there was not a tight board fence between the so-called dead alley and the native yards; or, third, because the steers began to die on the 11th of September; or, fourth, for two or more of said reasons together; fifth, nor may they infer there were ticks in said cars because the said steers began to die on said 11th day of September in the absence of other proof of said facts, unless the jury find that there was no other chance equally as probable for said steers to have picked up Texas ticks so as to have caused their deaths on September 11th and during the week or ten days following. (*Granted.*)

Defendant's 6th Prayer.—That it was the duty of the defendant to transport Southern cattle for immediate slaughter, and in so doing to unload them for rest, feed and water, and the jury may not infer negligence on the part of the defendant in respect of its duty to the plaintiff from the fact that it was regularly discharging its duty in so carrying Southern cattle during the summer of 1906. (*Granted.*)

Defendant's 8th Prayer.—If the jury find that the infection of the plaintiff's steers from Texas fever ticks might have occurred at other places, and in other ways than at the

Belpre yards, that is to say, either: First, in Barbour County, Kansas, where they originated; or, second, on the cars while being transported to Kansas City yards; or, third, at Kansas City yards; or, fourth, at the St. Louis yards; or, fifth, in the plaintiff's own pastures in Harford County, and further find that the chances for such infection at either of said five places, or in either of said five ways were at least equal to or even greater than the chances of infection at Belpre, then they must find their verdict in favor of the defendant. (*Granted.*)

Defendant's 9th Prayer.—Under the pleadings in this case there is no evidence legally sufficient for the jury to find that the plaintiff's steers were infected with the Texas fever ticks by reason of any negligence of the defendant in respect of the cars in which said steers were transported and the jury must exclude the same from consideration. (*Granted.*)

Defendant's 10th Prayer.—To entitle the plaintiff to recover he must show affirmatively and by a preponderance of evidence, either: First, that the Texas fever ticks were in the native yards at Belpre at or about the time the plaintiff's steers were fed there; or, second, facts from which it may be inferred with a reasonable degree of certainty that said ticks were in said yards at or about said time, and it is not legally sufficient to infer the presence of such ticks in said yards either from the absence of a tight board fence alone or from the existence of a gate in each of the fences enclosing the dead alley alone, or from both said facts together.

And if the jury find that the deaths amongst said steers on September 11th and thereafter tend to prove that the ticks causing the same might have been picked up at the Belpre yards and also that it was equally possible and probable that they may have been picked up elsewhere, then they must find their verdict in favor of the defendant. (*Granted.*)

Defendant's 11th Prayer.—If the jury find from the evidence that the cattle of the plaintiff were delivered to the defendant at E. St. Louis on August 24th and 25th, 1906, for carriage over the Baltimore & Ohio South Western, and its

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own road to Stepney, Md., in an apparently healthy condition, then in the performance of its duty of carriage the defendant was under the further duty to and did unload said cattle for rest, feed and water at its yards at Belpre on August 26th and 27th, 1906, and duly delivered said cattle to the plaintiff in an apparently healthy condition on August 27th and 28th, 1906, and if the jury further find that on September 11th, 1906, and thereafter 29 head died of Texas or tick fever at the farm of the plaintiff and elsewhere, then the fact of death from said disease is insufficient to raise a presumption that such disease resulted from the defendant's negligence, even although the jury may further find that said defendant between the first and 28th of August, 1906, may have carried Southern cattle over said Baltimore & Ohio South Western and over its own road and through its yards at Belpre, unless the jury find that in separating the native pens from the quarantine pens the defendant failed to exercise such care as a reasonably prudent man would do. (*Granted.*)

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

Stevenson A. Williams and Fred. R. Williams, for the appellant.

John S. Young and Harry S. Carver, for the appellee.

BOYD, C. J., delivered the opinion of the Court.

The appellee recovered a judgment against the appellant for damages sustained by him by reason of the alleged negligence of the appellant in the transportation of cattle, which resulted in the cattle contracting a disease known as the "Texas" fever. There are four counts in the declaration which are before us—demurrers to two others having been sustained. The first alleges that the plaintiff on August 23,

1906, placed in charge of the defendant seventy-five head of western steers in good health and condition and free from disease, at Kansas City, Missouri, for shipment to Harford County, Maryland, which the defendant undertook to carry safely and carefully; that said steers reached Parkersburg, West Virginia, on or about the 27th of August, when they were unloaded and fed by the defendant in its yards and pens, and were then reloaded on the cars of the defendant at Parkersburg; that when they were unloaded at Parkersburg to be fed by the defendant, as it was its duty to do, the defendant carelessly and negligently failed to take the proper care and precaution in the pens and yards aforesaid in feeding and caring for said steers, in order to protect them from disease and sickness, as it was required to do, and in consequence thereof they contracted a fever, known as the "Tick" or "Texas" fever, while in the Parkersburg yards or pens of the defendant. It is then alleged that by reason of the fever so contracted, by and through the carelessness and negligence of the defendant, a large number of the steers died after they reached their destination, in Harford County, the plaintiff was put to great expense and labor in caring for others affected with the disease, and was injured in his business as a cattle dealer; that the injury complained of was not due to any fault or want of care on the part of the plaintiff, but was due and owing to the carelessness and negligence of the defendant, by and through its wrongful and negligent acts aforesaid.

The second count alleges that it was the duty of the defendant to provide clean cars for transportation of said steers, and clean pens and yards in which to feed them en route from Kansas City to their destination in Harford County, but the defendant negligently and carelessly permitted its cars in which the steers were shipped, and its yard and pens in which they were fed, to become dirty and charged and affected with germs of disease. This count differs from the first mainly in including the cars as well as

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yards and pens, in not naming any particular yard and pens, and in not naming the disease.

The third and fourth counts were for thirty head of western steers, shipped from east St. Louis to Harford County—the third being in other respects substantially as the first, and the fourth substantially as the second. Demurrers to these counts were overruled, but we do not find any reversible error in those rulings, as in our judgment the allegations are sufficiently definite. The only ground for complaint we observe is the claim for damages to the plaintiff's business, but as that was eliminated by the thirteenth prayer, as modified, no injury was done the appellant by overruling the demurrers.

The defendant filed a general issue plea and three special pleas. The second alleges that the claims of the plaintiff set up in the declaration are based on an Act of Congress, approved February 2d, 1903, and upon certain regulations adopted and promulgated by the Secretary of Agriculture on March 13, 1903, pursuant to the authority conferred upon him by said Act of Congress. It is then alleged that the Act of Congress and regulations adopted by the Secretary of Agriculture are repugnant to the constitution of the United States, and in excess of the powers of Congress and of the Secretary under the constitution. The third refers to an Act of Congress, approved March 3, 1905, and regulations made and promulgated by the secretary of agriculture under that Act and alleges that they were unconstitutional. The fourth avers that the plaintiff relies on those two Acts of Congress, and the rules and regulations made and promulgated by the Secretary of Agriculture, and alleges that the Acts of Congress do not authorize, permit or sanction a right of action for damages, but on the contrary provide that the parties violating them shall be guilty of a misdemeanor, and on conviction be punished as set forth in the plea. The plaintiff demurred to the second, third and fourth pleas, and the demurrers were sustained. We think they were properly sustained, inasmuch as the declaration shows that the action

was based on the common law rights and liabilities of the parties, and not upon the Acts of Congress, or upon the rules and regulations made by the Secretary of Agriculture.

Seven bills of exception in reference to rulings on evidence are in the record and the eighth embraces the rulings on the prayers. The plaintiff offered eleven prayers, but all were refused excepting the tenth which refers to the measure of damages. The defendant offered thirteen—the first, second, third, fourth and twelfth were rejected, and the fifth, sixth, seventh, eighth, ninth, tenth and eleventh were granted as offered, and the thirteenth was granted as modified. The defendant excepted to the granting of the plaintiff's tenth prayer and to the refusal of its first, second, third, fourth and thirteenth prayers—the twelfth not being included in the bill of exceptions.

It will be well to first consider the extent of the common law liability of a carrier, if any, for such injuries as are complained of in this case. In this State it is settled that: "In the absence of an express contract, the common law duty and liability of a common carrier for the safe carriage and due delivery of live animals are the same as that for the carriage and delivery of other property; *the liability in all cases being qualified by the nature and inherent tendencies of the thing carried.* In undertaking the carriage of live stock, therefore, the carrier assumes the obligation to deliver safely, and within a reasonable time, having due respect to the circumstances of the case." *P. W. & B. R. Co. v. Lehman*, 56 Md. 231; *B. & O. R. R. Co. v. Whitehill*, 104 Md. 304. In *M. & M. Trans. Co. v. Eichberg*, 109 Md. 227, it was said, in considering the validity of a contract with reference to the burden of proof of negligence, that: "In the absence of contract, the law makes the carrier an insurer, and as the goods it carries may be injured or destroyed by many causes not due to its own negligence or want of care, the carrier is as much entitled to be paid a premium for its insurance of their safe delivery at the place of destination as for the labor and expense of conveying them there." In *B. & O. R. R.*

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Co. v. Green, 25 Md. 89, and *Fruit Co. v. Trans. Co.*, 104 Md. 567, common carriers are also spoken of as insurers. Some of the cases the appellant cites we do not deem applicable to this case, such as *W. M. R. R. Co. v. Shirk*, 95 Md. 649, and *Same v. Landis*, 95 Md. 750, and it is not necessary to enter into a discussion of them. They involved wholly different questions, the former being for the death of a passenger and in the latter the liability depended upon whether the injury occurred upon the defendant's road or upon a connecting line.

In 6 *Cyc.* 381, it is said: "Where the destruction of or injury to the goods is due to their inherent nature and quality, or defects therein, the carrier is not liable if his own negligence did not occasion or contribute to the injury. And perhaps it may be stated, as a general proposition that the carrier is not liable for loss happening from the operation of natural causes. In general, as already stated, a common carrier of live stock is subject to the same rule of liability as a common carrier of other goods or property, but if there is loss or injury due to the peculiar nature and propensities of the animals, then, under the principle stated in the preceding paragraph, the carrier is excused, unless the loss or injury could have been prevented by the exercise of reasonable foresight, vigilance and care on the part of the carrier."

Is then the liability of a carrier of live stock to be carried to the extent of holding the carrier responsible, as an insurer, from death or injury to cattle as the result of a disease such as this, or shall the shipper be required to prove negligence on the part of the carrier? We have found no such case which has gone so far as to hold the carrier liable without evidence of negligence, and it would seem to be an unwarranted application of the general common law rule to hold a carrier responsible for injuries resulting from Texas fever, merely because the cattle had been carried by it. In 5 *Am. & Eng. Ency. of Law*, 466, we find this statement: "Independently of statutory provisions, a carrier is liable for the loss of or damage to cattle intrusted to it for transportation, where

the loss or damage is caused by their being exposed to infection through the carrier's negligent conduct in placing them with diseased cattle, or in pens or cars where such cattle have been staying." Another rule is thus stated on page 446 of that volume: "The liability of the carrier is not confined to losses occurring during the time the stock are actually in its possession. If the cause of a loss occurring after their delivery to the owner is a cause which began to operate while they were in the carrier's possession, and is a cause for which it is responsible, it will be liable without regard to the time when the effects developed. But in such cases the burden is on the owner to show clearly that the loss was due to a cause for which the carrier is responsible." A carrier cannot be held liable merely because some cattle carried by it die or are sick fourteen or fifteen days after they are delivered, as a result of Texas fever, or any other disease, without showing that the carrier was responsible for their contracting the disease, and responsibility could not properly attach to it in a case of this kind unless it was negligent, or had failed in some duty it owed the shipper. Any other principle would make the carrier an insurer of the lives and health of the cattle, as well as having its ordinary duty to safely deliver them at the point of destination.

In this case the plaintiff relied in his *narr.* on the negligence and carelessness of the defendant, and the Court below adopted the view we have indicated as the proper one on that subject. As it rejected the prayers of the defendant which sought to take the case from the jury on the ground that there was no legally sufficient evidence of negligence, we must inquire into that question. In the testimony there is much very interesting information about the life of the "Tick" which produces the Texas fever, but we can only refer to such as may reflect on this case. As we understand the testimony, the infection is generally introduced into a section of the country north of the quarantine line established by the general government by the ticks being on southern cattle, when they are brought into a non-infected region.

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The "seed ticks," as they are called, are minute six-legged parasites, about one-thirty-second part of an inch in size. At that stage they crawl quite actively on the ground and among the leaves, bunching in large numbers on grass blades, shrubs, weeds and fence posts to await an opportunity to attach themselves to their passing "host," as the animal to which they attach themselves is called. Dr. John R. Mohler, Chief of Pathological Division, Bureau of Animal Industry, in the United States Department of Agriculture, is said by the witnesses to be recognized as good authority. In a bulletin prepared by him, and agreed by counsel to be used, he says, "The great length of time required for the appearance of the disease in northern cattle after the passage of tick-bearing cattle through the country (thirty to ninety days) can easily be accounted for by the life history of the tick. It is necessary, before the disease appears, for the fully developed fertilized female to drop off the southern cattle and deposit the eggs, and for them to hatch into the six-legged larvae. These must then crawl upon the northern cattle and insert the micro-parasites they carry through the bites made in the skin in procuring their nourishment. Texas fever follows. It will thus be seen that these females transmit the infection through their eggs to their progeny, and the latter have the power to infect any susceptible animal to which they attach. The disease therefore is not conveyed by the same ticks which take up the infected blood, but only through the generation descending from them."

He said that the time elapsing between the exposure of susceptible cattle to the tick and the appearance of Texas fever depends upon the climate and the development of the ticks to which they are exposed. "Thus, if any Northern animals are placed upon pastures, highways, or in pens, cars, etc., in summer immediately after the premises have been infested with the ticks from southern cattle, Texas fever may occur in from thirty to sixty days. * * * Where northern animals are not exposed in an infested pasture until the ticks which fell from the southern cattle have laid eggs and the

larvae, or seed ticks, are already present, the former cattle will develop symptoms in thirteen to fifteen days in hot weather. Thus under natural conditions the disease appears in thirteen to ninety days after exposure. After the seed ticks become attached to the animal the disease will appear in about ten days in summer, and after a somewhat longer period in cooler weather."

The thirty head of cattle were shipped from the east St. Louis stock yards on August 24, 1906. They were inspected there by a Government inspector, and a certificate given that they were "found free from any symptoms of scabies (mange) or Texas fever, and may be shipped for stockers." That certificate was delivered by the appellant to the appellee with the freight bill. They were unloaded at the Parkersburg or Belpre yards which belong to the appellant on August 26th—the yards are at Belpre, across the Ohio river from Parkersburg. After being fed and rested they were reloaded and shipped in the same car—arriving at Stepney, Harford County, on August 27th.

The seventy-five head were shipped in three cars from Kansas City Stock Yards on August 23, and arrived at East St. Louis Stock Yards, August 24th, where they were unloaded. On August 25th, they were reloaded in the same cars and shipped over the appellant's road. On August 27th they were unloaded at the Belpre yards, fed and rested, and reshipped in the same cars arriving at Stepney on August 28th. A similar certificate to that above mentioned was given at East St. Louis, by the Government inspector, and was delivered to the appellee by the appellant.

At the Belpre yards, in both instances, the cattle were unloaded and placed in what are called the "native pens," which are those used for animals not from infected territory. The native pens are on the east side of the yards, and are separated from the quarantine pens, which are on the west side of the yards, and in which infected cattle are placed, by an alley twenty feet wide and a dead alley ten feet wide. In August, 1906, there was a board fence on the west side

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of the twenty-foot alley (between it and the dead alley), with an inch space between the planks. That on the west side of the dead alley was a wire fence, but in October of that year both of those fences were made tight board fences, and are about six feet high.

Dr. Mohler says in his bulletin referred to, "Although young ticks are very active, neither they nor the adult ticks are capable of crawling very far, but they may be transported long distances by animals, by rains, by winds, cattle cars, hides, and on the clothing of man. Hence the constant danger that tick-free pastures below the quarantine line may become infested with ticks at any time." Dr. Drake, an expert called by the plaintiff, said that at stock yards where they feed cattle which are not infected and also those which are infected with Teras fever ticks, the main precaution should be quarantine or separation, and "to make it effectual it is necessary to have a tight board fence or a stone wall, estimated by the average person, as I think, about six feet;" that the fences should be "absolutely tight with the base boards or the stones underneath the ground and with no intervening spaces left, that is no knot hole, or the allowance of any other animals to communicate over the ground on which these animals pass; no attendants should be allowed unless they take the precaution to change their clothing or wearing apparel." He said: "This small parasite will pass through any of those crevices the same as if there was no fence there"—referring to open spaces and holes in the fences. In answer to a hypothetical question as to when he thought the ticks got on these cattle in controversy, he said it would be safe to deduct a period somewhere about fourteen days before the eleventh of September, 1906,—that being the day the fever was discovered, and when one of the cattle died. Then in answer to another hypothetical question he said there were only two points where the cattle could have become infected, either in transit or at the Belpre yards, and he thought it was at the Belpre yards.

As the Court granted the ninth prayer, instructing the jury that there was no legally sufficient evidence that the steers were infected by reason of negligence of the defendant in respect to the cars in which they were transported, and that they must exclude that from consideration, we are not concerned about that question. Without referring to further evidence, we do not feel justified in saying there was no evidence legally sufficient to be submitted to the jury on the question of negligence at the Belpre yards. Although it may seem singular that the disease can be communicated by such small parasites, moving the distance that these were required to go, there was some evidence tending to show that it could be done. It is not for the Court to determine which of the witnesses were correct, or which the jury should have accepted as the best informed on the subject. We think there was no error in rejecting the defendant's first, second and third prayers, especially with the answers to the hypothetical questions, which we have already referred to in evidence. We will consider those questions later, but as they were allowed to be answered, the answers must be considered in passing on these prayers. The fifth prayer, which was granted, was the same as the fourth, which was rejected, excepting the addition at the end, of which the defendant has no reason to complain. As the Court granted the ninth, there was certainly no injury done the defendant by rejecting its fourth and granting its fifth, as the addition was made to the part of the prayer that referred to ticks on *the cars*. The twelfth is not included in the bill of exceptions, as we have seen. Nor do we see any error in modifying the thirteenth prayer, as was done, as we understand the plaintiff admits his liability for the Baker cattle. Of course unless he is so liable he cannot recover for them, if Baker has paid him. We do not understand the objection to the plaintiff's tenth prayer to be pressed. It is perhaps rather broad in the concluding part. It might be made more definite so as not to mislead the jury.

The first exception was abandoned. The second and third may be considered together. It is true that it was held in

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Little v. Edwards, 69 Md. 499, that one party can use the testimony taken by the other party under a foreign commission, but we know of no case in which testimony in chief on a particular subject was rejected, and then the cross-examination on that subject admitted at the instance of either party. It would put counsel in a peculiar position in taking depositions. Counsel on one side may ask questions which the opposite counsel think improper, and if the latter is to be bound by the rule contended for by the appellee, he could not safely cross-examine a witness, because if he succeeded at the trial, in excluding the testimony in chief, his cross-examination might supply what his opponent was unable to prove in chief. On the other hand, if he does not cross-examine, the Court may not adopt his view as to the admissibility of the evidence, and he would not have the benefit of cross-examination. "Where a party uses a deposition taken by his opponent, he makes it his own, and the adverse party has the same right of objection to the questions and answers which he would have had if the deposition had been taken by the party offering it, and is not estopped by the fact that the interrogatories he objects to were propounded by himself." Note in 6 *Ency. of Pl. and Pr.*, 603 citing *Hatch v. Brown*, 63 Me. 410. "If a deposition is offered but the answers to the direct interrogatories are for some reason held inadmissible for the offering party, the answers to the cross-interrogatories are equally inadmissible, because otherwise a cross-examination would be allowed with no direct examination preceding." 3 *Wig. on Ev.*, sec. 1893. Of course, we understand that to refer to cross-interrogatories on the subject concerning which those in chief were excluded.

It seems clear, therefore, that a cross-examination in depositions on subjects excluded in chief ought not to be admitted if objected to. It is stated in the exception, that: "Plaintiff's counsel stated he did not intend to read any portion of the testimony ruled out by the Court," but the next question which was read inquired about Mr. Titus, and the third exception was to the question, "at what time did you

investigate to find out when the first symptoms appeared among the Titus cattle?" The witness then goes on to speak of the Titus cattle which had the disease, that the witness saw some of them which had died, that he discovered the tick, etc. That cross-examination was not only improper, as the testimony in chief on that subject had been excluded, but it is manifest that it was well calculated to injure the defendant and, therefore, was not harmless error. The evidence of the plaintiff was by no means conclusive, to show that the disease which resulted in injury to the plaintiff was contracted at Belpre, but when testimony in reference to the Titus cattle was admitted, it in all probability had a decidedly improper effect on the jury, although those cattle were at Belpre after the plaintiff's were shipped. We think, therefore, there was error in admitting the cross-examination on that subject.

The fourth and fifth bills of exception embrace the hypothetical questions asked Dr. Drake. The one in the fourth is not so objectionable, although it is defective because it erroneously assumes that the seventy-five cattle were reloaded at East St. Louis in other cars, but the fifth is decidedly and materially defective. Dr. Drake answered that question by saying that the cattle became infected at the Belpre yards. There are several material omissions in the question which we will mention. In the first place, it assumes that the cattle were "reloaded in other cars," while the proof is that they were reloaded on the cars in which they were brought from Kansas City. They were Chicago and Alton cars, No. 29290, 28117 and 28238, and the papers offered in evidence by the plaintiff show that the cattle went through on the same cars. The freight bills given to the plaintiff, and offered by him, also show that they were so shipped. Dr. Drake on cross-examination showed that he understood that the cars were changed. He, as well as other witnesses admitted, that cattle may become infected on cars, as well as in the yards, and hence it was a question of some considerable importance, as these cars had come from Kansas

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City, belonged to and were brought to East St. Louis by another company.

But there is a still more serious objection to the question. Part of it assumes "that the fences which divided the alleys that southern cattle passed up and down from the alleys that native cattle passed up and down at the yards at Belpre, O., were open, were not tight, from the ground to their height five or six feet from the ground." There is not one word in the question suggesting that there was a dead alley ten feet wide between the two alleys—on the contrary, the inference which might be drawn is that the alleys were contiguous. It is a very important fact, as the ticks could get through the fences more readily than they could get over the alley, and through the two fences. The fences are described in the question as just what Dr. Drake said they ought not to be, and although that was a most material part of the hypothetical question, no allusion is made to the dead alley ten feet wide. Some other objections to the question were made by the appellant, but we do not deem it necessary to discuss them. The evidence is very indefinite as to which alley in the stock yards these cattle were taken in, when they were unloaded at Belpre. If they were not driven through Alley No. 5, they were, so far as the evidence shows, not closer to the quarantine pens than thirty feet, as that alley is twenty feet wide, but we have assumed in passing on the exception that they were driven through Alley No. 5.

We do not see the relevancy of the testimony in the sixth and seventh bills of exception. If it be true that a Government inspector made a mistake in June, 1907, it cannot reflect on this question. It is altogether probable that inspectors may make mistakes at times,—indeed it would be remarkable if they did not, when dealing with such small parasites as these, and if the cattle show no signs of being infected by the disease, or are not known to have been in infected territory, the inspectors would not probably be as rigid in some cases, as might be necessary in order to detect unsuspected ticks. But specific instances occurring nearly a

year after the time the jury was considering could furnish no reliable evidence to guide them.

For errors in the rulings presented by the second, third, fourth and fifth bills of exception, and referred to above, the judgment will be reversed and a new trial awarded.

Judgment reversed and a new trial awarded, the appellee to pay the costs.

GEORGE WILLIAM McGEE vs. EDWARD G. CUYLER

ET AL.

*Master and Servant—Finger of Operator Cut Off by Machine—
Sufficiency of Evidence of Negligence.*

Plaintiff, a boy fourteen years old, was employed in defendant's machine shop to work on a machine called a reamer, which was used to cut small pieces out of pipes by means of blades attached to a revolving shaft. The plaintiff had been instructed in the use of the machine and warned not to put his fingers in the vise holding the pipe while the reamer was in motion. It was not dangerous when properly operated. On the day of the accident, on account of which this action was brought, plaintiff was standing on some boards placed in front of the machine. These gave away and threw his weight on the treadle, and thus brought up the vise in which plaintiff's hand was caught and one of his fingers cut off. The defendant did not furnish the platform for the operation of the machine. It was not necessary for that purpose and the use of boards around the machine had been prohibited. *Held*, that the case was properly withdrawn from the jury, since there was no evidence of any negligence on the part of the defendant either in not furnishing proper appliances or a safe place for the work, or in not instructing the plaintiff as

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to the use of the machine and the danger attendant thereon, and also because the act of the plaintiff in standing upon the boards was an assumption of risk on his part.

Decided January 11th, 1910.

Appeal from the Court of Common Pleas (ELLIOTT, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE and THOMAS, JJ.

J. Cookman Boyd (with whom was *Peter J. Campbell* on the brief), for the appellant.

William L. Marbury and *Geo. Weems Williams* (with whom was *Wm. L. Rawls* on the brief), for the appellee.

BRISCOE, J., delivered the opinion of the Court.

This is a negligence case, and the Court below, upon the conclusion of the whole testimony granted a prayer withdrawing the case from the jury and instructed them, there was no legally sufficient evidence to entitle the plaintiff to recover, and their verdict must be for the defendant. The judgment was against the plaintiff and he has appealed.

The single question presented by the record, is the propriety of the Court's ruling in granting the defendant's prayer, as stated.

This prayer, being in the nature of a demurrer, raised the question of the legal sufficiency of the evidence and of the right of the plaintiff to recover.

The plaintiff was a boy of fourteen years of age, and at the time of the occurrence of the accident was in the employ of the defendants, who are the owners of and operate a plant in the City of Baltimore, for the manufacture of machines, tools, plumbers' supplies, etc. He was injured while so employed by having one finger cut off by a machine, which he was operating.

The declaration avers, that on or about the 19th day of October, 1908, the plaintiff was employed by the defendants to work in their machine shop in the City of Baltimore, that he was put to work on a machine known as a reamer which was operated by belting and which was used for the purpose of cutting the bur out of the edges or ends of small pieces of pipe, the pieces of pipe being placed in an iron vise or grip, which is a part of the reamer, by the forefinger of the right hand and held there until securely fastened, after the machine would be started by treading on a wooden handle or pedal, the end of which was about two feet from the floor, causing the front part of the reamer to which was attached a round shaft, on the front end of which shaft there is a projecting blade or blades, to move with great rapidity towards the piece of pipe held in the vise or grip and enter into and revolve around the pipe. That although unknown to this plaintiff at or before the time of the accident, but well known to the defendants, the machine was exceedingly dangerous and should be operated only by a skillful and experienced mechanic; that this plaintiff was a new hand in operating the machine, without any experience, with no knowledge of machinery and with no knowledge of the dangerous character of this particular machine; that while so engaged in operating the machine, and while exercising due care and caution on his part, and because of the negligence and want of care of the defendants and their agents in not furnishing him reasonably safe and proper appliances with which to work, and in not furnishing him a reasonably safe and proper place in which to work, and in not properly instructing the plaintiff in the use and manner of operating said machine, and the dangers attendant thereon, his right forefinger was caught by the blade or blades on the shaft and the same was completely cut off, thereby seriously injuring him.

The machine and the manner of its operation, is described by the witness Lindsay, an expert engineer as follows: "The nipples or piece of pipe that is to be reamed, is grasped in the jaws of the vise or chuck by the turning of the hand-

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wheel. The vise is made to move by guides of some kind in the bed, in a line parallel with the shaft on which the reamer revolves, that motion is imparted to the vise by means of a chain attached to the vise, one end of which is attached to the treadle. The motion of the vise toward the reaming tool is obtained by pressing down upon the treadle. There appears to be attached to the opposite side of the vise a rope or cable to which is hung a number of weights. The object of those weights is evidently to return the vise to its initial position after the work is performed, after the foot is removed from the treadle. Now, describing the operation, I would say the nipple is first inserted in the vise, the head revolving by a bolt, then the foot is placed upon the treadle, which starts through the medium of this chain, the vise carrying with it the nipple against the reaming tool which performs the work. The foot is removed from the treadle, and the action of the counterweight returns it to its initial position, when the work is removed from the vise and another piece is inserted."

The primary and controlling cause of the accident, is stated by the plaintiff in his testimony to be as follows: "Then, as I was standing on the platform down here, the piece under this side slid from under me, and I had my foot on the treadle and the finger in here (indicating), the finger here, and as I stepped on the platform here the board on this side gave way and that threw my weight on full on the side, right on the treadle; threw my weight on this treadle (indicating), and brought this vise up and cut my finger from the knuckle, right back of the knuckle, off," and that he did not know what made the platform give way. It appears from the evidence, it was, the giving away of the platform near the machine which caused him to slip and press the treadle. and this caused the injury.

The specific negligence charged, in the declaration against the defendant, consists, first, in the failure of the defendants to furnish the plaintiff safe and proper appliances, with which to work; secondly, the failure to furnish him a rea-

sonably safe and proper place in which to work; and thirdly, in not properly instructing him, in the use and manner of operating the machine and the dangers attendant thereon.

We have examined the evidence presented on this record with great care, and we are unable to find any proof whatever of any negligence on the part of the defendant, which according to the well settled rules of law applicable to this class of case that would justify a Court, in holding the defendants liable in this action.

The injury of which, the plaintiff complains, was not due to any neglect of duty, the defendants owed the plaintiff but it was caused by the slipping of certain boards, which the plaintiff called a platform near the machine, on which the plaintiff stood, at the time of the accident. This platform, was described by the plaintiff as consisting of "two or three pieces of board laying on top of each other at each end, and a piece of board laying across of them" and these boards were not fastened together. It was not a fixture and was not secured to the floor. He also testified, "and this end here gave way under me and my weight fell on the treadle when the vise came together and I had my finger in the nipple and was caught in the revolving knife," and that he did not know what made the platform give way. There is some conflict in the evidence as to whether or not the platform or boards were there at all, as testified by the plaintiff. But the testimony of two of the defendants' witnesses, that the defendants did not furnish the platform, for the operation of the machine and did not permit such boards around the machine, is absolutely uncontradicted and not denied.

The witness Foster the foreman testified, "to the best of my knowledge and belief there was no such thing (meaning a platform), because it is something I don't permit around a machine in that place there, to allow anything that would be a trap here that an employee is liable to fall over or against the mechanism," and the defendants do not furnish platforms for the operation of the machines. And in answer to the question if the treadle is at its highest point eighteen inches

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above the floor, is it necessary in order to operate that treadle, for the operator to stand on a platform, he replied, it was not.

The witness Dockson testified, there was no platform at the machine when he taught the boy how to work, or after he was injured, and the only boards he saw, were in the galvanizing room, and not near the machine, that it would be just as easy to run the machine standing on the floor, with the foot on the treadle, as standing on a box, that the foreman did not allow the employees to have boards around the machines.

But assuming, the platform or boards were there, as testified to by the plaintiff, it is quite certain, there can be no recovery in this case, because the uncontroverted evidence shows that the defendants did not furnish it, but prohibited the use of boards around the machine. The evidence also shows that there was no necessity for the use of these boards to operate the machine, and there was no platform or boards around the machine, when the plaintiff was first instructed in the work, he was employed to do. If there was a platform there at all, it was put there without the knowledge of the defendants and against the express directions of their foreman, by someone acting without authority.

The established doctrine and rule of law, in such cases, is correctly stated in 12 *A. & E. of Law*, 2nd Ed., 952-3, and supported by the American cases. It is this: "A master should not be charged with liability for the negligence of a workman who furnishes an appliance without having been authorized by the master to discharge that duty, and if the defective appliance which caused the injury was constructed by a servant, no part of whose employment it was to construct such appliances for anybody but himself, there can be no recovery."

In *Callaway v. Allen*, Circuit Court of Appeals, Seventh Circuit, 64 Fed. Rep. 297, it was held, where a servant is injured by the careless use by his fellow servants of a machine which is not necessarily dangerous, if properly used and which is not furnished by the master, but by the fellow

servant against the master's orders, the master is not liable therefor.

In *Maxfield v. Graveson*, 131 Fed. Rep. 841, it is said, the fact that an employee was not present at the time a change was made in appliance by his fellow servants without the master's knowledge by reason of which he was subsequently injured, does not render the master liable for the injury.

In *Guggenheim Smelting Co. v. Flanigan*, 62 N. J. L. 354, it is said, if the master supplies proper tools and appliances for the work in which his employees are engaged, he is not liable for an injury which one of his servants receives by reason of the servants selecting from such tools and appliances one not adapted safely to his work. If the master furnishes safe ladders and a servant uses a ladder not provided by the master, but made by a fellow workman as a temporary make-shift by reason whereof the servant is injured, the master is not liable for the injury, although the servant may have reason to believe the ladder he uses is one of those provided by the master. And to the same effect, are the cases of *Maher v. Thropp*, 59 N. J. L. 186; *Felch v. Allen*, 98 Mass. 572; *McKean v. Colorado Fuel and Iron Co.*, 18 Colo. App. 285; *Mercer v. Jackson*, 54 Ill. 397; *Wilson v. Quarry Co.*, 77 Iowa, 429.

There is not a particle of evidence to show that the defendants did not use proper care and diligence in furnishing the reamer, the machine upon which the plaintiff was employed to work. It was not necessarily dangerous, if carefully handled and properly worked.

Nor does the evidence show, that the appellees failed to provide and maintain a reasonably safe place for the plaintiff to operate the machine. There is no contention that the reamer was not properly constructed or defective in any respect whatever, but the evidence shows that it was one that is ordinarily used for the purpose of the work the plaintiff was employed to do. But if the place was rendered unsafe and dangerous by the presence of the platform or boards, near the machine; it was a condition and danger, not created

or caused by the appellees, and for which they can in no way be held liable. They neither furnished nor authorized the use of the boards or platform, and prohibited its use. If such a responsibility, said the Supreme Court of New Jersey, in the *Smelting Co. Case, supra*, is cast upon the master, it would be necessary in his protection to have an *alter ego* to attend constantly upon every workman in his service, to see that he did not use an implement unfitted for his work. The imposition of such a duty upon the master is without reason, justice or authority to uphold it.

But apart from this, we are of the opinion, that the danger, under the facts of this case, of going upon the boards, and putting his finger inside the nipple when placing it in the vise, was open, obvious and apparent to him, and a plain assumption of risk on his part.

There can be no difficulty in this State as to the rule of law applicable to a case like this. It has been considered and determined by recent decisions of this Court. *Linton v. Balto Mfg. Co.*, 109 Md. 404; *Gans Salvage Co. v. Byrnes*, 102 Md. 247; *Tkac v. Md. Steel Co.*, 101 Md. 179. Mr. Bailey in his work on Masters' Liability for Injuries to Servants thus states the general rule, which has been approved by the Courts of the States: "It is the duty of the servant, on entering upon his service, to ascertain what he is expected to do, and the dangers directly connected therewith.

"As stated by a learned Court: 'It is the duty of the servant to exercise care to avoid injuries to himself. He is under as great obligation to provide for his own safety from such dangers as are known to him, or are discernible by ordinary care on his part, as the master is to provide for him. He must take ordinary care to learn the dangers which are likely to beset him in the service. He must not go blindly to his work where there is danger. He must inform himself. This is the law everywhere.'

"When he is a learner, and engages to work in a hazardous branch of the service, he must improve every opportunity

furnished by the master to learn of his duties and their accompanying danger. If he fails, he is guilty of neglect. He must use reasonable care in examining his surroundings, to observe and take such knowledge of dangers as can be attained by observation. In performing the duties of his place, he is bound to take notice of the ordinary operation of familiar natural laws, and to govern himself accordingly. If he fails to do so, the risk is his own. He is bound to use his eyes to see that which is open and apparent to any person using his eyes; and if the defect is obvious, and suggestive of danger, knowledge on the part of the servant will be presumed, as well as when the dangers are the subject of common knowledge.

"The duty of the master, in such case, is not to see that the servant actually knows. He has a right to rest upon the probability that anybody would know what was generally to be seen by his own observation. So that in building his structures or conducting his business the master has the right to assume that the servant will exercise, in their use, ordinary care, and not unnecessarily expose himself to hazards not necessary or usual in his employment. The master's duty is met when he constructs and maintains his appliances in such manner that they are reasonably safe when prudently used. The degree of care on the part of the servant required to be exercised is such care, prudence and caution as prudent men under similar circumstances would ordinarily exercise. Negligence in a servant may, and often does, consist in failing to know, as well as failing to do; and such is always the case when it is his duty to inform himself and know."

And this rule is supported by the following cases: *Linton Coal and Mining Co. v. Persons*, 43 N. E. Rep. 651; *Feely v. Pearson Cordage Co.*, 37 N. E. Rep. 368; 26 Cyc. 1213, sec. 6; *Linton v. Balto. Mfg. Co.*, 109 Md. 404; *Gans Salvage Co. v. Byrnes*, 102 Md. 247; *Eckhart v. Lazaretto Guano Co.*, 90 Md. 189.

The risk of placing his finger inside the nipple, in contact with the revolving knife, was obvious, plain and open, and

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was an assumed risk on his part. The master is clearly not bound to instruct or to warn his servants against risks and dangers which that servant can appreciate. *Hettchen v. Chipman*, 87 Md. 729; *Michael v. Stanley*, 75 Md. 464.

In the case at bar, the plaintiff was instructed how to operate the machine and was told the machine was dangerous. He was warned at times in its use, and was told not to put his finger inside the nipple because there would be danger, if the nipple came in contact with the revolving knife.

It is contended upon the part of the appellant there was conflict in the testimony, as to whether the boy was instructed to place his finger in the nipple when operating the machine to constitute such negligence, as to have taken the case to the jury. Mr. Lindsey, the plaintiff's expert, testified, putting the finger inside the nipple when placing it in the vise was the right way to handle the nipple and to operate the machine.

We are of the opinion, upon a review of the whole case, that the record does not furnish any legally sufficient evidence of negligence on the part of the defendants, and there was no question for the jury to determine. The defendants' prayer withdrawing the case from the jury was properly granted and the judgment will be affirmed.

Judgment affirmed, with costs.

CONSOLIDATED GAS ELECTRIC LIGHT AND
POWER COMPANY AND BALTIMORE
ELECTRIC COMPANY *vs.* JOHN
N. CHAMBERS.

*Lineman on Pole Injured by Breaking of Cross-Arm—Duty to
Inspect Poles—Assumption of Risk—Insuffi-
cient Evidence of Negligence.*

When an employing corporation, owning poles carrying wires, has no independent system of inspection of the poles, cross-arms, steps, etc., and a lineman employed to work on such poles has no reason to believe that such inspection is made, he has no right to rely on the employer for inspection, but must himself make such tests as may be necessary to ascertain whether it is safe to go upon them, and cannot hold his employer responsible for injuries received by him by the giving away of such poles, or cross-arms, unless there was some defect in them when they were originally placed in position, or the employer had some knowledge of the defect which was not communicated to the lineman; provided the lineman is not such an inexperienced person as is entitled to be instructed as to the danger.

On a pole owned by a telephone company were strung the wires of an electric company and of a power company, the two latter companies being the defendants in this case. A cross-arm carrying wires of the power company was the lowest on the pole, and while the plaintiff was engaged in affixing above it a cross-arm for the electric company, he stood on that lowest cross-arm, which broke on account of dry rot on the inside and plaintiff fell to the ground and was injured. No evidence of any defect in the original construction of this cross-arm or in the wood of which it was made was offered. Plaintiff was an experienced lineman, and knew that it was not customary for the defendant to inspect the poles on which he was sent to work. He also knew that cross-arms some-

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times break and he did not make use of the safety belt which he had with him. In an action against both companies to recover damages for the injury so occasioned, *held*, that the plaintiff's employer is not liable, since the plaintiff should have tested the cross-arm before putting his weight on it, and the injury was caused by a defect which he himself could have detected as well as the defendant, and which the defendant was not required to guard against by an independent inspection, and the risk was one which the plaintiff assumed as necessarily incident to the employment.

Held, further, that the plaintiff is not entitled to recover against the power company, the owner of the cross-arm, since it was equally his duty to rely on his own inspection as against that company, and there is no evidence to show that it was aware of the defective condition of the cross-arm.

Decided January 11th, 1910.

Appeal from the Superior Court of Baltimore City (STOCKBRIDGE, J.), where there was a judgment on verdict for the plaintiff for \$2,000.

The plaintiff offered the following prayers which were modified by the Court by the insertion of the words italicized and the omission of the words in brackets:

Plaintiff's 1st Prayer.—If the jury find from the evidence that on May 21, 1907, the plaintiff was employed by the defendant, the Baltimore Electric Company, as a lineman. And that on said date the plaintiff as such lineman, with the witness Ford also a lineman in the employment of said defendant, was ordered by said defendant to ascend a certain pole and construct on said pole certain cross-arms for the use of the said defendant, if they so find.

And further find that in the doing of said work on said pole that the only mode or method of doing the same by the plaintiff, required him to stand on a cross-arm on said pole of the Consolidated Gas and Electric Light and Power Company, as testified in this case, if they so find.

And further find; that the said cross-arm of the Consolidated Gas and Electric Light and Power Company on which the plaintiff was required to stand in doing said work, if they so find, was rotten beneath the surface, and which rottenness was hidden from outside view, if they so find.

And further find, that the moment the plaintiff, while using due and ordinary care, if they so find, stepped on said cross-arm to do said work, the said cross-arm, because of said rottenness, immediately broke and threw the plaintiff to the ground below and injured him, then the verdict of the jury should be for the plaintiff as to said defendant, the Baltimore Electric Company.

Provided the jury further find that the rottenness of said cross-arm, which caused it to break and throw the plaintiff to the ground below and injured him, if they so find, was unknown, hidden and not obvious to the plaintiff, when he stepped on said cross-arm to do said work, if they so find. And further find that under the plaintiff's employment by said defendant, he was not required to inspect said cross-arm to discover in it rottenness unknown, hidden and not obvious to him, if they so find *and that said rottenness was not discoverable by the plaintiff by the exercise of ordinary care.* And further find from all the facts and circumstances in evidence, that the plaintiff in stepping on said cross-arm used due and ordinary care and was not guilty of negligence directly contributing to his said injury, if they so find, and provided further, that the said defendant, by the exercise of ordinary care could have (by the proper inspection of said cross-arm) discovered the inside rottenness of said cross-arm before sending the plaintiff up said pole to do the work for said defendant of constructing said buck-cross-arms, if they so find, and also find from all the facts and circumstances in evidence that the said defendant was guilty of a want of ordinary care (in failing to inspect said cross-arms for inside rottenness before requiring the plaintiff to do said work on said pole, which required him to stand on said cross-arm, if they so find) and that said want of ordinary care on the part

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of the said defendant directly contributed to said injury to plaintiff. (*Granted as modified.*)

Plaintiff's 3rd Prayer.—If the jury find from the evidence that on May 21, 1907, the defendant, the Consolidated Gas and Electric Light and Power Company, was the owner and had control of a certain cross-arm on a certain pole, which pole was in the common use of the Maryland Telephone Company and the defendants to this suit, and that the use of said pole was a part of the permanent plant of the said defendant, the Consolidated Gas and Electric Light and Power Company, and that said cross-arm on said pole on May 21, 1907, was rotten on the inside and dangerous to stand upon by any lineman, if they so find.

And further find, that it was necessary for the plaintiff in doing the work assigned him by his employer, the Baltimore Electric Company to stand on said cross-arm, if they so find, and that on said date as the plaintiff stepped on said cross-arm, the same broke and threw him to the ground and injured him, then the verdict of the jury should be for the plaintiff, as against the defendant, the Consolidated Gas Electric Light and Power Company; provided, that the rottenness of said cross-arm was unknown, hidden and not obvious from the outside to the plaintiff; and that said rottenness was not discoverable by the plaintiff by the exercise of ordinary care, and provided further that the plaintiff exercised under all the facts in evidence ordinary care in stepping on said cross-arm. And provided further the jury find that the defendant, the Consolidated Gas Electric Light and Power Company, by the exercise of ordinary care, could by inspection have discovered said inside rottenness of said cross-arms before the plaintiff stepped on said cross-arm and removed it. (*Granted as modified.*)

The defendant's first and second prayers withdrew the case from the jury for lack of evidence of negligence and were refused.

Defendant's 3rd Prayer.—The defendant, the Consolidated Gas Electric Light and Power Company of Baltimore, prays

the Court to instruct the jury that if they find from the evidence that the cross-arm which broke and caused the plaintiff's injuries, was at the time the plaintiff went upon the same in such bad condition that it must have been evident and apparent to the plaintiff had he used due care that said arm was dangerous and insufficiently strong to support his weight, then their verdict must be in favor of this defendant. (*Granted.*)

Defendant's 4th Prayer.—The defendant, the Consolidated Gas Electric Light and Power Company of Baltimore, prays the Court to instruct the jury that if they find from the evidence that the plaintiff by his own negligence directly contributed to the happening of the accident on account of which this suit is brought, that then their verdict must be in favor of this defendant, even though they may find that this defendant was also negligent and no matter how great the negligence of this defendant may have been. (*Granted.*)

Defendant's 5th Prayer.—The defendant, the Consolidated Gas Electric Light and Power Company of Baltimore, prays the Court to instruct the jury that if they find from the evidence that it was not necessary for the plaintiff in doing the work on which he was engaged at the time of the accident to stand upon this defendant's cross-arm, *and that the plaintiff failed to exercise ordinary care in going upon said cross-arm in the manner and under the circumstances testified to in the evidence*, that then their verdict must be in favor of this defendant. (*Granted as modified; the words in italics being added by the Court.*)

Defendant's 6th Prayer.—If the jury find from the evidence that it is the usual practice of ordinarily careful and prudent linemen to examine or test cross-arms on poles before standing on same, either by sounding the same with plyers or hammer, or with the foot or otherwise and to ascertain from the sound so made whether or not the cross-arm is in safe condition to support the weight of a man, and if they find that reasonable care requires a lineman so to do, and if the jury find that the plaintiff in this case failed to

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use such reasonably necessary precautions, then their verdict must be for this defendant. (*Granted.*)

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, BURKE and THOMAS, JJ.

Vernon Cook (with whom were *Gans & Haman* on the brief), for the Consol. Gas, etc., Co., appellant.

William L. Marbury and *Walter L. Clark*, for the Baltimore Electric Co., appellant.

Thomas G. Hayes and *R. E. Lee*, for the appellee.

BOYD, C. J., delivered the opinion of the Court.

This suit was instituted by the appellee against the Consolidated Gas Electric Light and Power Company, Baltimore Electric Company of Baltimore City and the Maryland Telephone Company. At the end of the plaintiff's case, a verdict was rendered in favor of the Telephone Company, and the case proceeded against the other two companies, resulting in a verdict in favor of the plaintiff against them. We will speak of the first named as the Consolidated Company, of the second as the Electric Company, and of the other as the Telephone Company.

There was a pole about sixty feet high, on the corner of Forest avenue and Ware alley, in Baltimore City, which was owned by the Telephone Company, and which was used by the three companies—although the record does not accurately show what arrangement there was between them. There were five cross-arms of the Telephone Company at the top, then three of the Electric Company, and one of the Consolidated Company. The latter was about thirty-five feet from the ground. On May 21st, 1907, the plaintiff and Frank B. Ford, who were linemen of the Electric Company, were ordered to put three cross-arms on this pole, which we understand to be the three mentioned above. The plaintiff said

that his duties as lineman were to climb poles, put on cross-arms, string wires and hang transformers, and Ford spoke also of putting up poles. They had put two of the cross-arms on, and were about to put the third on when the plaintiff, to quote his testimony, "started to get in position to do the work and stepped on this cross-arm which broke and he fell to the ground." The cross-arm which broke belonged to the Consolidated Company and was the lowest one on the pole. The plaintiff testified that before he stepped on it, he looked at it and it appeared to be sound; that he could not have done the work without standing on the arm, because it was in the way; that he could not have stood on one of the steps (which consisted of iron spikes placed in the pole about eighteen inches apart), because they did not come up that far, and were not close enough to stand on.

Ford testified that he told plaintiff to get around the pole, so he (Ford) could set the bolts and put the nuts on, and as plaintiff got down from the position he was in he put his foot on the arm about eighteen inches from the pole, and over the top of the brace, and "almost before I knew anything, Mr. Chambers left me and I was on the pole by myself." He also said that was the proper place for the plaintiff to go to get the arm the way he wanted it, to adjust it so as to get the bolts in, and that there was no other position the plaintiff could have taken to do that work. The testimony tends to show that the cross-arms are ten feet long, and three and a quarter by four and a half inches thick, and that the one that broke had the "dry rot" on the inside. The plaintiff was very badly injured by the fall.

The two companies offered separate prayers. The Electric Company has abandoned its exceptions, excepting those to the rejection of its first, second, third and fourth prayers, and to overruling its special exception to the plaintiff's first prayer, which was granted. Those prayers of that company were intended to take the case from the jury, and we will first consider them. It will be borne in mind that the plaintiff was an employee of the Electric Company, and he went

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upon the pole to do certain work for that company. The question presented by those prayers is whether the plaintiff is entitled to recover from his employer, the Electric Company, for injuries sustained by reason of the cross-arm of the Consolidated Company being defective and breaking under his weight. The ground relied on in the declaration for a recovery against the defendants is: "That the rottenness of said cross-arm was unknown and not obvious to the plaintiff, because the paint on said cross-arm concealed from the plaintiff the said rottenness. That it was the duty of said defendants to said plaintiff, when performing his duties as lineman on said pole, by the exercise of ordinary care to have discovered the rottenness of said cross-arm and removed the same or warned the said plaintiff of the rottenness of said cross-arm. This the defendants negligently and carelessly failed to do," etc.

One peculiarity about the case is the fact that the plaintiff, as the lineman of the Electric Company, was injured by a cross-arm which belonged to the Consolidated Company, over which the Electric Company had no control. The alleged violation of duty by the two companies is therefore based on two separate grounds—the one sending its employee into a dangerous place without warning him, or previously examining it, and the other maintaining a dangerous place. There is nothing to show that the Electric Company had the right to remove the defective cross-arm, and therefore its responsibility, if any, must rest on the failure to discover the defect and warn the plaintiff of it. It is not contended that it did make an examination or test of the cross-arm, or did warn the plaintiff that it was defective. The precise question, therefore, that presents itself *in limine* is, whether it was the duty of that company to have inspected the cross-arm of the other company, before sending the plaintiff upon the pole.

The general use of electricity for various purposes has brought before the Courts many cases involving the duty, *vel non*, of inspecting poles and their appurtenances. The

plaintiff testified that he did not know of any system of inspecting the poles this defendant had, and there is no proof that it had any beyond what the linemen themselves did. He was not therefore misled by any knowledge of inspection by the company. He had been engaged in the work of lineman for fourteen years, had been employed by ten other companies, doing regular lineman's work, such as climbing poles, stringing wires, working on cross-arms, etc. He had worked for this company for four months before he was injured, and had previously worked for it, probably a year or so altogether, but had not worked for the Consolidated Company. He was an experienced lineman, and of course, knew, as he testified, that cross-arms sometimes broke, that they sometimes became rotten from one cause or another, and that there was a certain amount of danger in going on one. He had a safety belt with him and was told by his companion to put it on. It is not easy to see, therefore, why under such circumstances his employer should be held responsible for what he manifestly had as good an opportunity to detect as any other employee of his employer would have had. Of course, if a company had, to the knowledge of its linemen, a regular system of inspection of the poles and cross-arms, independent of what the linemen themselves would be supposed to make, another question would arise, for then the linemen would have the right to assume that the independent inspection had been made.

It is therefore not surprising to find that, in the absence of such independent inspection, the general weight of authority is that "an experienced lineman assumes the risk of the breaking of any pole he is called upon to climb in the course of his employment, if the defect which caused the pole to break was not of original construction, and that therefore his employer owes him no duty to inspect the pole before sending him upon it." Note to *Lynch v. Saginaw Valley Traction Co.*, 153 Mich. 174, reported in 21 L. R. A. N. S. 774, where a great many cases are cited. There is no evidence tending to show that there was an original defect in this cross-arm.

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It is true that the plaintiff testified that he had never been specially instructed as to detecting faults in cross-arms, so as to see whether they were rotten or not, but it would not require more special knowledge than a lineman of ordinary intelligence, of fourteen years' experience, would be presumed to have, to make such a test as would be necessary to make himself reasonably safe. As was said in *McIsaac v. Northampton Lighting Co.*, 172 Mass. 89, in speaking of linemen: "They easily could make any necessary tests to ascertain the condition of the poles as to soundness without the aid of special inspectors, and, from their knowledge of common affairs, could judge whether the pole was safe to go upon." And again in that case, it was said, the plaintiff "must have known that it would be inexpedient and impracticable to have a man or company of men to go and examine each pole upon which a lineman was about to work, to see whether it would sustain the strain which the work would put upon it."

In *Sias v. Con. Lighting Co.*, 73 Vt. 35, it was said, in speaking of a lineman's examination of a pole before going on it: "It is auxiliary to the lineman's principal work, can be conveniently made in connection with it, and requires no separate training. It is difficult to conceive of any preliminary work that would be more clearly in the line of the servant's duty. It could hardly be required that a company sending out a gang of men to repair its line should send other men before them to inspect the poles, and determine which could safely be climbed without the taking of precautions." In *McGorty v. S. N. E. Tel. Co.*, 69 Conn. 635, referred to in *Stewart & Co. v. Harman*, 108 Md. 451, it was said: "It cannot be laid down as a proposition of law, as seems to be claimed by plaintiff's counsel, that the linemen of telegraph and telephone companies have a right to rely upon the soundness and safety of the poles upon which they are working, and that it is the duty of such companies to inspect and test poles, and support such as are insecure, before permitting their linemen to climb them. Whether it is incumbent upon the master or the servant to perform such a duty is usually a

question of fact depending upon the terms of the contract of employment, the servant's knowledge of the hazards of the work in which he is engaged, his ability and opportunity to discover the dangers to which he is exposed and to avoid them, and upon other circumstances."

The same rule is applicable to the cross-arms upon electric poles. In *Flood v. U. N. Tel. Co.*, 131 N. Y. 603, a lineman was killed by the breaking of a cross-arm on which he sat while working on one of the defendant's poles. It was there said: "The defendant had a system of inspection which appears to have been all that was practicable. Its inspectors went along the line of the telegraph poles and wires, and carefully looked at them, and tried the poles to see if they were still strong and adequate. They were provided with arms so that if they discovered any that were insufficient they could replace them. They were not expected to climb up every pole and examine the arms thereon. Such an inspection would be manifestly impracticable and unnecessary. The linemen all discharged their duties in the daytime. They have frequent occasions to climb the poles and work about the arms, and obviously they are the persons who are expected to see the condition of the arms, and if they find them insufficient, to replace them or report them. It is the obvious duty of every lineman before going upon one of these arms many feet above the earth to inspect it for his own safety." See also *Johnston v. Syracuse Lighting Co.*, 193 N. Y. 592; *Britton v. Central Union Tel. Co.*, 131 Federal, 844; *Roberts v. M. & K. Tel. Co.*, 166 Mo. 371; *South, Bell Tel. & Tel. Co. v. Starnes*, 122 Ga. 602, although the latter was in part governed by a statute.

Many other cases might be cited, but those above are sufficient to show the trend of the decisions, and others can be found referred to in the note and cases we have mentioned. While the facts necessarily differ in them, the general rule to be deduced from them may be thus stated: when the employer has no independent system of inspection of poles, cross-arms, steps, etc., and the lineman has no reason to believe

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that such inspection is made, he had no right to rely on the employer for such inspection, but must make such tests himself as may be necessary to ascertain whether it is safe to go upon them, and cannot hold the employer responsible for injuries received by him by such poles, cross-arms, or steps giving away, unless there was some defect in them when they were originally placed in position, or the employer had some knowledge of the defect, which was not communicated to the lineman—provided, of course, the lineman is not such an inexperienced person as is entitled to be instructed as to the danger. Of course, there may be some exceptions to such a general rule, but we find nothing in this record that would take the case out of it. There is more reason to apply such a rule to cross-arms than to poles, for there are usually so many more of them, and, as said in *Flood's Case*, *supra*, inspectors “were not expected to climb up every pole and examine the arms thereon. Such an inspection would be manifestly impracticable and unnecessary.” Indeed it is far safer for the linemen themselves to make the inspection and such tests as may be necessary for their safety, as they would do so at the very time they went upon them, while in many instances that would be impossible if separate inspectors were relied on.

This doctrine is not in conflict with the one we have so often announced, that the master must furnish a reasonably safe place for his servant to work in, as that is always subject to the qualification that when a servant knowingly engages in dangerous work he must not rely alone on such rule, but he assumes the risk incident to such dangerous place. The plaintiff was told by his companion “to get his safety and to get around here (indicating) so I could set them both,” and he gave as a reason for not using the safety that he did not have time—meaning that he fell before he put it on. But if he had taken time to use the precautions which were at hand he would have escaped this unfortunate accident. In *Stewart & Co. v. Harman*, 108 Md. 446, we quoted from *Buswell on Per. Inj.*, sec. 204, that: “The principle is that where a

servant has as good opportunity as the master to ascertain and avoid the danger himself, he will have no recourse against the master in case he is injured thereby, and he accepts the employment upon this implied condition." Then after quoting from *McGorty v. S. N. E. Tel. Co.*, *supra*, JUDGE WORTHINGTON said: "And it was determined under the circumstances of that case 'that each lineman should look out for his own safety in climbing poles,' and that the master was not guilty of negligence, for failure to provide a system of independent inspection."

The appellee quotes in his brief an expression used by this Court in *Md. Tel. Co. v. Cloman*, 97 Md. 620, that: "It was the duty of the plaintiff if he relied on failure to inspect, to have offered some testimony which would have justified the jury in finding that the defect causing the injury was one which could have been discovered by the usual and ordinary methods of inspection, commonly adopted by those in the same kind of business, which was conducted by the defendant," and he claims there was such testimony. That statement was quoted from *Schaefer's Case*, 96 Md. 88, but while the expression was applicable in both of those cases, it is not here. In the *Cloman Case* the defect relied on was a knot in a cross-arm, which, of course, was there before the cross-arm was put in position, and the question was whether the company's agents could have discovered it by such inspection as is usual in such cases, but, there is no evidence that there was any defect in the original construction of this cross-arm, or in the wood of which it was made. If there had been, the further question would have arisen as to how far the Electric Company could be held responsible for it, inasmuch as the Consolidated Company, and not the Electric Company, was the owner of the cross-arm. In *Schaefer's Case* there was machinery which not only required care in the original purchase, but it is the duty of an employer to have such inspection of machinery of that character, after it is put in use, as is commonly adopted by those engaged in the same kind of business. In many instances the employee who runs a ma-

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chine would be utterly incapable of detecting defects, which may prove dangerous and disastrous, but surely no man is a competent lineman, who, after fourteen years' of experience, cannot tell by such tests as independent inspectors would adopt, as well as they could, whether a cross-arm is safe to place his weight upon it in addition to the weight of the wires it is intended to carry. A careful man, or even a careful boy, will generally make some test of a limb of a tree, before he places his whole weight upon it, if it be of such size or appearance as to suggest it may give way.

Nor are such cases as *Crawford v. United Ry. Co.*, 101 Md. 402, and *Md. D. & V. R. Co. v. Brown*, 109 Md. 304, applicable to this. It was said in *Crawford's Case* that "when the business of the master is such that the safety of one servant depends upon the way in which other servants do their work, it is the duty of the master to *adopt, promulgate and enforce* reasonable and sufficient rules to protect and promote the safety of its employees exposed to danger." There can be no doubt about that, and when it is the duty of the master to inspect, he should have a system of rules providing for proper inspection, which should be rigidly enforced. *Crawford* was a conductor, and it was not his duty to inspect the car before he took charge of it, to see whether the handhold which caused his injury was in proper condition. So in *Brown's Case*, he was injured by a collision between his train and a runaway engine. It was not his business to inspect the engine which came in collision with the one he was driving. In cases of that character the servant has the right to expect *and require* the master to make such inspections as are customary and proper, but in this case, where the plaintiff had no reason to suppose that independent inspectors were employed to inspect or test the cross-arms, where there is no evidence that the company had ever undertaken to have such inspection, and where there is no necessity shown for it, as the plaintiff could have tested it as well, and perhaps better, than if it had been done at stated intervals by others, there was no such duty resting upon the company.

So without further discussing the cases, or inquiring how far the fact that the cross-arm belonged to another company would relieve the Electric Company, if otherwise responsible, we are of the opinion that the plaintiff cannot recover against it.

It only remains to briefly consider his right to recover against the Consolidated Company. Assuming that there is no doubt about the right of the plaintiff, as the servant of the Electric Company, to go on this pole, and that if that company could have been held responsible, the Consolidated Company could likewise have been so held, as the owner of the cross-arm, and hence owing a duty to the servants of the other companies having the use of the pole to exercise care, what is the standard of that care? It is said in the note to *C. C. & St. L. Ry. Co. v. Berry*, reported in 46 L. R. A., on page 52, that: "The standard of that care is virtually identical with the standard exacted from a master to his own servant," and that must be a correct statement of the rule. There is no contractual liability to the servant of another person, although there may be in some instances a duty which the owner owes him, if he authorized him to go upon his property, but as we have determined that the Electric Company is not responsible, under the circumstances, it would seem to be clear that the Consolidated Company cannot be held liable merely because it was the owner of the cross-arm. Much of what we have said above is applicable to this branch of the case. If it was the duty of the plaintiff, as we have said it was, to rely on his own inspection and tests, as between him and his employer, it was equally so, as between him and the Consolidated Company, which owned the cross-arm. There is no evidence to show that it was aware of its defective condition, and if it could not be detected by the plaintiff, if he made a proper examination, there is nothing to show it could have been by the Consolidated Company's agents, and if it could have been detected by the plaintiff by the use of ordinary care, then, of course, he could not hold this defendant responsible.

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So, although we deeply sympathize with the plaintiff for this unfortunate accident, we feel constrained under the law to reverse the judgment, and, as there can be no recovery, a new trial will not be awarded.

Judgment reversed, without awarding a new trial, the appellee to pay the costs.

JAMES CLARK, GUARDIAN, ET AL. vs. EVELINE CRESWELL.

What Constitutes Delivery of Deed—Alteration in Deed After Delivery—Cloud on Title Created by Unauthorized Alteration of Deed.

When the grantor has executed and acknowledged a deed and delivered it unconditionally to a third person for the grantee, the conveyance is complete, and the title has passed, although the grantee may be ignorant of the fact of the delivery of the deed to another for his benefit.

After the grantor has executed, acknowledged and delivered a deed no subsequent alteration made in it by him can affect the estate of the grantee.

A mother purchased certain real estate for her daughter Eveline to hold during her life, and at her decease to become the property of her heirs and assigns. The deed was executed, acknowledged and delivered by the grantor to the mother. Afterwards, and before the deed was recorded, the husband of Eveline asked her mother to insert his name in the deed, and the grantor at her request interlined the husband's name in the granting clause, and made the property pass to the heirs at "their decease." The deed was not re-executed or re-acknowledged, and these changes were not made with the consent of of the first grantee. *Held*, that since the original grantee, Eveline, had acquired a complete estate in the land

by the deed as first executed and delivered, that could not be affected by these alterations, and that she is entitled to maintain a bill in equity to have the same declared void as constituting a cloud on her title.

Decided January 14th, 1910.

Appeal from the Circuit Court for Howard County (FORSYTHE, J.).

The cause was argued before BOYD, C. J., PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

James Clark, for the appellants.

Frederick Dallam (with whom was *Ogle Marbury* on the brief), for the appellee.

URNER, J., delivered the opinion of the Court.

This appeal involves a consideration of the effect of alterations made in a deed, after execution and delivery, under the circumstances disclosed by the record.

It appears that Margaret A. Lizear purchased certain land for her daughter, Eveline Creswell, who is the appellee in this case. The deed as prepared at the instance of the vendor conveyed the property to "Eveline Creswell to hold during her life and no longer, at her decease to become the property of her heirs, their assigns, in fee simple." It was duly executed and acknowledged and was delivered by the grantor to Mrs. Lizear, who paid the purchase money. This was on September 30th, 1896. About two months later and before the deed was recorded, Mrs. Lizear, in order to gratify the desire of John Creswell, husband of Eveline, that his name be inserted in the deed, returned with it to the grantor, who at her request interlined the husband's name in the granting clause. He also, apparently upon his own motion, changed the word "her" preceding the word "decease" to "their" so that the clause was made to read "unto Eveline Creswell and

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John Creswell, her husband, to hold during her life and no longer, at their decease to become the property of her heirs, their assigns, in fee simple." The deed was not re-executed or re-acknowledged. It was returned to Mrs. Lizear and later on it was recorded and then sent by the clerk to the appellee. The latter learned from her husband, before the deed reached her, that it had been changed so as to include him as one of the grantees. At that time the appellee was in possession of the property and has so continued to the present time. She did not consent to any change in the deed. Mrs. Lizear had other children, and to each of these, about the time of the conveyance to Mrs. Creswell, she made a pecuniary gift nearly equal to the amount of that purchase. It was undoubtedly her primary purpose to give the real estate in question to her daughter, the appellee, as a home, and it is evident from the record that her son-in-law was not originally an object of her bounty and that he was not considered in connection with the conveyance until after the property had been bought and paid for and the deed had been formally executed, acknowledged and delivered by the grantor.

The proceedings before us are due to the fact that the appellee sold the property and the purchaser declined to take the title because of its supposed infirmity resulting from the alterations of the deed referred to, and the assertion by the appellee's husband of an interest in himself under the deed. In order to remove this cloud from the title the bill in this case was filed by the appellee as plaintiff against her husband, their children, the heirs at law of Mrs. Lizear, who died in 1905, and the grantors in the deed, as defendants. The bill alleges the facts we have mentioned and prays that the interlineation of the name of John Creswell as a grantee, and the change of the words "her decease" to "their decease," in the deed, may be declared null and void, and that the cloud upon the title thereby created may be removed and the plaintiff decreed to have quiet enjoyment of the property as against the parties to the cause. The defendants were all duly summoned. After answers filed by some of them and a decrec

pro confesso against the remainder, including John Creswell, who has made no appearance or defense, testimony was taken establishing without contradiction the facts already stated.

The Court below decreed that the attempted alteration of the deed was a nullity and that the plaintiff have quiet enjoyment of the property as prayed. In this determination we concur.

A deed duly executed and acknowledged is effective from the time of its delivery. *Barry v. Hoffman*, 6 Md 78. There is a consummated delivery when the instrument has passed from the grantor, without right of recall, to the grantee or some third person for his use. *Hearn v. Purnell*, 110 Md. 465; *Duer v. James*, 42 Md. 492; *Woodward v. Camp*. 22 Conn. 457. The test of delivery is the relinquishment by the grantor of the custody or control of the deed. When he has formally executed and acknowledged it and has delivered it unconditionally to the grantee, or one acting for him, the conveyance is completed and the title has passed. Note to *Munro v. Bowles*, (Ill.) 54 L. R. A. 865; *Shrader v. Bonker*. 65 Barb. 615.

Even though the grantee may be ignorant of the delivery of the deed to another for his use, yet his assent is presumed from the fact that he is benefited by the transaction. *Moore v. Giles*, 49 Conn. 570; *Bryan v. Walsh*, 7 Ill. 557; *Stewart v. Weed*, 11 Ind. 92; Note to *Munro v. Bowles*, *supra*; *Robbins v. Rascoe*, 120 N. C. 79.

In this case the only person, under the facts shown by the record, to whom the title, both legal and equitable, could be transferred by the deed at the time of its execution and delivery was the appellee. She was the only grantee then named in the deed; and the fact that the property was bought and intended for her, as well as the relationship of parent and child, prevented a resulting trust from arising in favor of her mother who paid the purchase money. *Walsh v. Mc-Bride*, 72 Md. 45; *Hays v. Hollis*, 8 Gill, 357; *Mut. Ins. Co. v. Deale*, 18 Md. 26. The grant to her for life with remainder to her heirs invested her with the fee simple title

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under the rule in *Shelley's Case*. *Waller v. Pollitt*, 104 Md. 172.

It seems clear, therefore, that the grantor in the deed, when he executed, acknowledged and delivered it on September 30th, 1896, divested himself absolutely of the entire title, and that it was immediately transferred by the deed to the grantee to whom the conveyance purported to be made and for whom the property was in fact purchased. The title being thus effectually vested in the grantee, it could not be impaired by the subsequent alterations in the deed, especially when they were made without the grantee's consent.

A deed is merely the medium for the transfer of the title from the grantor to the grantee, and when its purpose is once fully accomplished its subsequent disposition cannot affect the title it has conveyed. It may be altered, mutilated, lost or destroyed; its executory provisions may be rendered inoperative by fraudulent changes or otherwise; but the title which has passed by it will remain undisturbed.

As was said by the Supreme Court of Massachusetts in *Chessman v. Whittemore*, 23 Pick. 233: "When deeds of conveyance of real, or bills of sale of personal property, are completed and possession delivered under them, so far as the change of ownership depends on them they are executed, and the property passes and vests in the grantee. The instruments may become invalid, so that no action can be maintained upon the covenants contained in them, and yet the titles which have been acquired under them remain unaffected. When a person has become the legal owner of real estate, he cannot transfer it or part with his title, except in some of the forms prescribed by law. The grantee may destroy his deed but not his estate. He may deprive himself of his remedies upon the covenants, but not his right to hold the property. This distinction has existed from the earliest times."

In *North v. Henneberry*, 44 Wis. 320, where an alteration in a deed after execution and delivery was held to have destroyed the covenants in the deed, the Court ruled that

"such alteration did not, however, destroy or divest any estate which may have vested in the grantee at the date of its delivery; it only renders the deed so far void that no action can be maintained on any of the covenants contained therein by any party to the alteration."

This general principle was recognized also in *Rifener v. Bowman*, 53 Pa. St. 318, where the Court said: "If a grantee of land alter or destroy his title deed, yet his title to the land is not gone. It passed to him by the deed; the deed has performed its office as an instrument of conveyance, and its continued existence is not necessary to the continuance of title in the grantee but the estate remains in him until it has passed to another by some mode of conveyance recognized by law. It is the instrument which is rendered void, not the estate."

In *Everett v. Everett*, 48 N. Y. 220, a father purchased property and had the deed made to his son as grantee. The deed was delivered to the father who received and retained possession of the deed and the land. The son was never informed of the conveyance. After the death of the latter the father destroyed the deed and obtained another from the grantor to a different grantee. The title being tried in ejectment, between parties claiming through the respective grantees, it was held that the execution and delivery of the first deed, although the grantee was ignorant of its existence, had the effect of divesting the grantor of the title and transferring it to the grantee, and the judgment in favor of the party claiming under that grant was accordingly affirmed.

In discussing a situation somewhat similar to the present case, where a change had been made in the body of a deed, the Supreme Court of Alabama said that "if the alleged alteration in the deed was made after its delivery, then such alteration did not affect the conveyance." *Gulf Red Cedar Co. v. O'Neal*, 131 Ala. 129. The same general rule is stated, and authorities in its support are collected in 2 *Cyc.* 187.

In *Cole v. Pennington*, 33 Md. 476, after the execution and acknowledgment, but before the recording, of a deed to a

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married woman, her husband, without her consent, endorsed on the deed immediately under the acknowledgment a provision to the effect that the grantor and another should have a home during their lives or pleasure in the premises described by the deed, with remainder to the children of the grantor. It was held that this condition was plainly no part of the deed and that as it was not shown to have been written by the authority of the assignee and signed either by herself or someone by her duly authorized, it could not operate as a re-demise of the premises; and, said the Court: "If it be true that it was appended after the deed was executed, and without the knowledge or sanction of the assignee, it was wholly void and without any effect whatever."

We hold, therefore, as already indicated, that the alterations in the deed now in question were, under the circumstances of this case, ineffectual to divest the appellee of; or invest any other person with, any interest in the property conveyed by the deed, and as the changes shown by the record to have been made in it after its delivery have created a cloud upon the title of the appellee to land of which she is in possession, she is entitled to have the cloud removed and the deed restored to its original state in this proceeding in which all possible interests are represented.

It is conceded, and could not well be doubted, that a Court of Equity has jurisdiction to grant such relief. *Polk v. Rose*. 25 Md. 153; *Du Val v. Wilmer*, 88 Md. 66; *Stewart v. May*. 111 Md. 162.

In accordance with the views we have expressed the decree of the Court below will be affirmed.

Decree affirmed with costs.

P. FREDERICK ETZEL vs. WILLIAM DUNCAN.

Bill by Client to Vacate Contract of Compensation with Counsel—Undue Influence—Evidence.

Plaintiff's bill in this case alleged that he had employed the defendant as his counsel to conduct certain litigation and had signed a paper agreeing to pay defendant everything over and above a certain amount which defendant might obtain in settlement of the suit, and had afterwards executed a receipt for the sum paid him; that plaintiff executed these papers believing that the litigation had been settled for a certain sum, but that he afterwards learned that a larger amount had been paid to the defendant. The bill alleged that the agreement and release had been obtained by undue influence, and asked that the same be annulled. *Held*, that the evidence fails to support the allegations of the bill, but on the contrary shows that the plaintiff had full knowledge of the terms upon which his suit had been compromised, and that the amount retained by the defendant was that which the plaintiff had agreed should be retained by him.

Decided January 13th, 1910.

Appeal from the Circuit Court No. 2 of Baltimore City (SHARP, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

Emil Budnitz and J. Cookman Boyd, for the appellant.

William S. Bryan, Jr., for the appellee.

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THOMAS, J., delivered the opinion of the Court.

The bill of complaint in this case was filed by the appellant for the reformation of an agreement and receipt executed by him and delivered to his counsel, the appellee, and to compel the latter to pay him the difference between the amount actually received by the appellee and the amount which, it is alleged, the appellant agreed to pay him for certain professional services, on the ground that said agreement and receipt were procured by the undue influence of the appellee.

The bill was answered by the appellee, denying that the receipt and agreement were obtained by undue influence, and averring that they are in entire conformity with an oral understanding, had at the time he was employed, as to the amount he was to receive for his services, with the exception of a modification of the original agreement in favor of the appellant.

The learned Court below, after considering the evidence, which was produced in open Court, and after a hearing, dismissed the bill, and unless we are convinced by the record in the case that there was error in this ruling, we must affirm the order appealed from.

The appellant, who was improvident, and had always been addicted to habits of idleness and dissipation, returned to Baltimore after an absence of fourteen years, and with the assistance of an acquaintance or confederate, who seems to have had some experience in such matters, began to investigate the affairs of his father, who was said to have been miserly and to have acquired considerable property, with the hope of finding some means by which he could secure a portion of his father's estate. It had been the habit of his father to deposit in a savings bank twenty-five dollars a year for each of his children in their names, and they found that the amounts so deposited for the appellant had greatly increased by the accumulation of interest. The officers of the savings bank would not, however, pay him more than \$40.00 without the production of his bank book, and his friend got one-half of that. They, or rather his friend, Mr. Behrens, also dis-

covered that his father and mother had conveyed to his, the appellant's sister, Miss. Julia Etzel, property estimated to be worth \$49,000.00, and they immediately determined to institute proceedings against her, on the ground that the conveyances were the result of undue influence, with the view, it would seem from the statement of Mr. Behrens, of securing something from her by effecting a compromise. With that end in view, they went to see the appellee, and to employ him to take charge of the case and to file a bill against his sister to set aside the conveyances to her. The appellee agreed to take the case, not, however, so far as the record shows, for the purpose of forcing a compromise, but with the view of trying the case; the bill was filed, and some months thereafter, in June, 1906, the appellee was informed by Mr. Behrens that Miss Etzel, the defendant, was willing to pay \$4,000.00 in settlement of the case, which compromise the appellant said he was willing to make, whereupon the appellee took from him a written authority, dated June 18, 1908, to settle the case for \$4,000.00, and an agreement not to settle the case without his consent, and to pay him for his services, stating, at the time, that he thought he could secure a more advantageous settlement. The same day, with the consent of her attorney, Mr. Smith, the appellee went to see the defendant, Miss Etzel and obtained from her the following agreement:

"June 18/06.

I hereby agree to pay William Duncan, Att'y for P. F. Etzel, \$3,000.00 in cash, and convey three ground rents, to wit: 1102, 1104 and 1106 Columbia, of \$42. each, and the said Duncan agrees to dismiss the case now pending in the Circuit Court No. 2.

Witness my hand and seal.

JULIA ETZEL. (Seal)

Witness: MISS CECILIA ROSS."

The next day the appellant went to the office of the appellee and executed the following agreement in the presence of Miss New, who was employed in the appellee's office.

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"BALTIMORE, June 19, 1906.

I, Peter Frederick Etzel, in consideration of the sum of one dollar, do hereby agree to pay to William Duncan for his services all over three thousand dollars for procuring me the money or ground rents in settlement of the case of mine against my sister, Julia Etzel, now pending in the Circuit Court No. 2.

Witness my hand and Seal. P. FRED ETZEL. (Seal)

Test: ELMA F. NEW."

"The above P. Fred Etzel acknowledged on June 20th, 1906, that he thoroughly understood the above contract and agreement, and that it truly represents his wishes.

J. WILSON LEAKIN."

On June 20, 1906, the \$3,000.00 mentioned in Miss Etzel's agreement, was paid to the appellee, and the ground rents were conveyed by her to herself and the appellee in trust for the appellant; the appellee paid the appellant \$1,000.00, and the appellant executed a release to his sister, and acknowledged, before J. Wilson Leakin, Esqr., that he thoroughly understood the above agreement, as stated in the memorandum written on the agreement by Mr. Leakin, and gave to the appellee a receipt as follows:

"BALTIMORE, MD., June 20, 1906.

Received of William Duncan, \$1,000.00 in cash and a deed for three ground rents of \$42.00 each, on the northwest side of Washington Avenue, being in full settlement, as per contract, in settling the case of mine against my sister, Julia Etzel, in the Circuit Court No. 2.

Witness my hand and Seal. P. FRED ETZEL. (Seal)

Test: ELMA F. NEW."

The testimony of the appellant and of Mr. Behrens is to the effect that they did not know that the case had been settled for the \$3,000.00 and the ground rents; that the appellant did not know of the contents of the release he gave his

sister, which recited the terms of the settlement; that he did not read the release, and that it was not read to him, and that he signed the above agreement and receipt, and accepted the \$1,000.00, believing that the settlement had been made for four thousand dollars, and that the appellee was receiving for his services one thousand dollars, which he had agreed to allow. If such were the facts of the case then the appellant was the victim of a most glaring and palpable fraud. Or if the facts were that there was no agreement as to the compensation to be allowed the appellee until the agreement of June 19, 1906, when the terms of the settlement with Miss Etzel had already been agreed upon, it would require the most convincing proof of the utmost good faith on the part of the appellee, and of full knowledge and entire freedom of action on the part of the appellant, before a Court of equity could give its sanction to such an allowance for the services rendered. It is stated in 1 *Am. & Eng. Ency. of Law*, 959, that: "The relation of attorney and client being quasi fiduciary, all transactions between them to be upheld must be *uberrima fides*, and to establish that such is the case rests with him who would uphold the transaction. The jealous care and scrutiny over such transactions extends to all gifts, conveyances, and contracts by the client, and all securities given by him pending the relation. The foundation of the rule is the influence arising from the relation; so long, therefore as the influence exists the rule of course applies." And in 4 *Cyc.* 960, it is said that, "owing the confidential and fiduciary relation between an attorney and his client and to the influence of the attorney over his client growing out of that relation, Courts of law, and especially of equity, scrutinize most closely all transactions between an attorney and his client. To sustain a transaction of advantage to himself with his client, the attorney has the burden of showing, not only that he used no undue influence, but that he gave his client all the information and advice which it would have been his duty to give if he himself had not been interested, and that the transaction was as beneficial to the client as it

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would have been had the client dealt with a stranger." But no where has the rule been more clearly stated than in the case of *Merryman v. Euler*, 59 Md. 588, where JUDGE IRVING, referring to the facts in that case, said: "It is immaterial whether the appellee was drunk when the assignment was made or not; for it was abundantly clear that the relation of client and attorney existed; and, under such circumstances, the law makes a presumption against the attorney and in favor of the client. In such case the *onus* is on the attorney to prove the entire *bona fides* and fairness of the transaction, which he has failed to establish to the satisfaction of the Court below or to us. * * * All the authorities concur that the highest degree of fairness and of good faith is required from an attorney towards his client, and all their dealings will be closely scrutinized, and no contract between them will be upheld where any undue consequences result to the attorney. * * * The attorney is supposed to have an ascendancy over the client, because of his relation to him, and can easily impose on his credulity; therefore, transactions, which would be open to no objection where no such relation exists, will be held invalid as against a client."

The testimony of the appellant, however, is not supported except by the testimony of Mr. Behrens, who, it appears, first sued the appellee for a part of the fee he received on the ground that he was entitled to a further portion after having received from the appellee \$500.00, and has stated that he now expects to receive a part of whatever the appellant recovers from the appellee in this case, and whose attitude in the case does not therefore, entitle him to full credit. While the positive and direct statement of the appellee is that when the appellant and Mr. Behrens came to see him the first time to employ him, they agreed that he should receive for his services one-half of the amount he recovered for the appellant, and that when they came to him in June and informed him that the case could be settled for \$4,000.00, he then reminded them of the agreement that he was entitled to receive one-half and that they assented; that when the com-

promise with Miss Etzel had been accomplished, and he was making a final settlement with the appellant, the appellant said he thought as the case had been compromised he ought not to insist upon charging the one-half, and he agreed to take \$500.00 less and the appellant was entirely satisfied; that the appellant had full knowledge of the terms of the settlement with Miss Etzel; that the release, the agreement and receipt were read to and by him, and that he acknowledged in the presence of Mr. Leakin that he fully understood the agreement and that it was in accordance with his wishes.

Mrs. Pierson, who was employed at the time of these transactions in the office of the appellee, testified that she heard the appellee remind the appellant and Mr. Behrens, on the day the authority to settle the case for \$4,000.00 was signed, that he was entitled to one-half; that the release to Miss Etzel was read to the appellant by the appellee, and that the appellant then took it and read it himself; that the agreement signed by Miss Etzel was shown to the appellant and was also read to him by the appellee, and that she witnessed his signature to the agreement and to the receipt.

Mr. Leakin states that the appellant and appellee came to his office together, and that the appellee had the agreement signed by Miss Etzel and the agreement signed by the appellant; that the appellee read to the appellant, in his presence, the agreement signed by Miss Etzel, and that he, Mr. Leakin then read to him the other agreement, and that the appellant stated to him that he understood them, and that they were in accordance with his wishes, and that he, Mr. Leakin, then made the memorandum, referred to above, on the bottom of the agreement signed by the appellant.

In view of this testimony, and in view of the fact that the testimony was taken in open Court, thus affording the lower Court an opportunity to see the witnesses and to judge of the credit to which their evidence was entitled, we would not be justified in holding that any fraud or undue influence was practiced on the appellant, or that he did not agree in the

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first instance to pay the appellee one-half of the amount recovered.

So far as the record discloses, the appellee was a stranger to the appellant, and if, when he employed the appellee, he agreed, in the presence of the friends he had selected to assist him in his venture against his sister, to allow him one-half of the amount recovered, he has no claim upon a Court of Equity to relieve him of a contract deliberately made, and we must, therefore, affirm the order of the Court below.

Order affirmed, the appellant to pay the costs in this Court and in the Court below.

THE COUNTY COMMISSIONERS OF ANNE ARUNDEL COUNTY *vs.* WILLIAM S. WATTS.

Liability of County Commissioners for Failure to Repair Bridge—Bill of Particulars.

Plaintiff was required by contract to do work at a place to which the only means of access was a certain public highway, over which it was necessary for him to haul material for the work. It was the statutory duty of the defendants, the County Commissioners, to keep the highway in repair. On account of their failure to repair a bridge which was part of the highway, the same became impassable; plaintiff was unable to convey in due time the material to the place where his contract required it to be used, which made him liable to a penalty for each day's delay in the work, and he was compelled, at an increased cost, to transport the material in hand cars on a railway. *Held*, that since the wrongful act of the defendants in failing to keep the bridge in repair had caused to the plaintiff an injury different in degree and kind from that suffered by the public at large, he is entitled to recover damages therefor from the County Commissioners.

Where a bill of particulars was not filed by the plaintiff in a cause until after the defendant had demurred to the declaration, the bill of particulars is not to be considered in passing on the demurrer.

Decided January 14th, 1910.

Appeal from the Circuit Court for Anne Arundel County (BRASHEARS, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

James W. Owens, for the appellant, submitted the cause on his brief.

James M. Munroe, for the appellee.

BOYD, C. J., delivered the opinion of the Court.

The appellee sued the appellant for damages sustained by him by reason of its failure to keep in repair a bridge which was a part of the only public highway the plaintiff could use in hauling material to a point where it was bound under penalty to do certain work within a limited time. The declaration alleges that the plaintiff had a contract with the Maryland Electric Railway Company to construct for it some concrete piers in the Patapsco river, in the construction of which lumber, sand, cement and other materials were needed, which the plaintiff was obliged under his contract to provide and convey to the place where the piers were to be constructed; that the plaintiff was required to commence work on the piers within five days from the date of the contract, and to complete them within twenty working days from that date, there being a penalty of \$15.00 per day to be paid by the plaintiff for every day beyond said period required for the completion of the piers; that the plaintiff had provided

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lumber, cement and other materials and deposited the same at Pumphrey's station on said railway company's line of railroad, and had provided sand a short distance below said station, all of which materials he was prepared to haul from said points to the place where said piers were to be constructed, said haul to be over the county public road, thence by a county public bridge to the lands of one Linthicum, through whose lands the plaintiff had made arrangements to haul said materials for the purposes aforesaid; that the said public county road, of which the bridge was a part, was the only public road affording access from said Pumphrey's station and its neighborhood to the place where the piers were to be constructed, and the plaintiff had no other access by a public highway for himself, his servants and agents, his beasts, carts and wagons, to transport the materials from Pumphrey's station to said place.

It is further alleged that relying upon the county public road and bridge as the means of access to said place, he entered into the contract to construct the piers and laid out and expended large sums of money in the purchase of lumber, cement and other materials, and in providing sand and in depositing the same at Pumphrey's station, to be from there transported; that the bridge was permitted by the defendant to become wholly impassable, although it had the custody and control thereof and was responsible for the proper maintenance of it for public travel; that the defendant, unmindful of its duty in the premises, and with notice of the bad condition of the bridge, suffered and permitted it to become and to remain out of repairs and broken down so that it was impossible to pass over it with carts and wagons and transport over it the material aforesaid.

It is then alleged that the situation of the plaintiff was peculiar and different from that of others in respect to the road and bridge and the use thereof, in that the plaintiff was under contract to construct said piers as aforesaid and could not furnish and transport to the place where they were to be constructed material other than that already provided, within

the time required by his contract and for many days thereafter, and could not transport by any public highway the material already provided, and was by reason thereof required to lay out and expend large sums of money in and about the transportation of said material greatly in excess of the cost of hauling the same over said public road and bridge, as the plaintiff was entitled to do, and expected to do when he entered into said contract.

The trial resulted in a verdict for the plaintiff, and this appeal was taken from the judgment rendered thereon. The appellant demurred to the declaration, but the demurrer was overruled. The only ground relied on in the brief is that the allegation in the narr. that the bridge in question was the only means of access to the point where the contract was to be performed was contradicted by the bill of particulars, which appellant contends shows there was a railroad by which the materials could be carried. Without meaning to say that it would have made any difference in our judgment, the record shows that the bill of particulars was not filed until after the demurrer had been overruled, and hence could not have been considered with the demurrer, even if it could have properly been considered if filed sooner. We will not therefore further refer to the demurrer, except to add that it was properly overruled.

The defendant excepted to the granting of the plaintiff's prayer and to the rejection of its prayer seeking to take the case from the jury. The two points suggested in the brief are: (1) That the damage sustained by the plaintiff differed only in degree and not in kind from other persons using that bridge; and (2), that there can be no recovery because the appellant cannot be held responsible in action *ex delicto*. The learned attorney for the appellant, after discussing the first point, states in his brief: "The appellant, however, under a probability of criticism, at its advancing a new doctrine in Maryland, says: that while counties in Maryland can be sued '*ex contractu*' that notwithstanding a long

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line of decisions to the contrary, the appellant asserts that they cannot be held responsible '*ex delicto*.'

As the latter point is answered by so many cases in this State it is not necessary to dwell upon it. It cannot properly be said to be merely "advancing a new doctrine in Maryland," as that doctrine was advanced and rejected in *Baltimore v. Marriott*, 9 Md. 160, over fifty years ago, and in *County Commissioners v. Duckett*, 20 Md. 468—forty-five years ago—the rule announced in *Baltimore v. Marriott* was distinctly applied to actions *ex delicto* against County Commissioners. Too many cases have followed those to permit us to entertain the suggestion that there is any possible reason for now considering the propriety of adopting the opposite view.

It is well settled that a public nuisance "is not in itself a ground of civil action by an individual, unless he has suffered from it some special and particular damage, which is not experienced in common with other citizens. 9 Md. 178. In such case the actual damage constitutes the gist of the action, and must be averred and proved." *Houck v. Wachter*, 34 Md. 265. Again it was said in that case: "All the authorities agree that to support the action, the damage must be different, not merely in degree, but different in kind from that suffered in common; hence it has been well settled, that though the plaintiff may suffer more inconvenience than others from the obstruction, by reason of its proximity to the highway, that will not entitle him to maintain an action." After setting out at length the averments in the declaration, the Court also said: "It is not averred that the highway, which was obstructed, was the only way to and from his farm, or that it was necessary to enable him to pass and re-pass from his farm to mill, market, etc. The averment is, that it was the most direct and convenient route." It was said by JUDGE ALVEY in *Garitee v. Baltimore*, 53 Md. 437, after referring to the principle announced in *Houck v. Wachter*, that: "In the application of this general rule, however, each case must depend, more or less, upon its own special circumstances,"

and it may be well to cite some of the cases in which recovery has been allowed.

In *Rose v. Miles*, 4 M. & S. 101, cited in *Houck v. Wachter* and *Garitee v. Baltimore*, the plaintiff was obstructed in navigating a river by the defendant wrongfully mooring a barge across it; it was held he was entitled to maintain his action, it being alleged that he was compelled to unload his barges and carry his goods overland, by which he incurred great expense. In *Wilkes v. Hungerford Market Co.*, 2 Bing. N. C. 281, cited in *Garitee v. Baltimore*, *supra*, and *Crook v. Pitcher*, 61 Md. 510, the plaintiff was a bookseller who had a shop by the side of a highway which was obstructed by the defendant, and the declaration alleged special loss in his trade and business. TINDALL, C. J., said: "All who passed had the right of way; but all had not shops * * *. In *Baker v. Moore*, the refusal of the plaintiff's tenants to remain on the premises was considered damage sufficiently peculiar and private to entitle the plaintiff to sue the defendant for having erected a wall across a common way used by the tenants." In *Rose v. Groves*, 5 M. & G. 613, cited in *Garitee's Case*, *supra*, the declaration alleged that the plaintiff was possessed of a public house abutting on a navigable river, and that the defendant wrongfully and maliciously placed upon the river, and kept there for a considerable time, certain timbers whereby the access to the house was obstructed, and divers persons were prevented from coming to the house, who would otherwise have done so. The Judges held that the declaration presented a case of special and particular damage to the plaintiff, and that the action was maintainable.

Other cases might be cited, but that of *Bembe v. Anne Arundel County*, 94 Md. 321, is conclusive of this. The County Commissioners had allowed a bridge, which was part of a public highway, to become and remain broken down and impassable, and in passing on a demurrer to the declaration this Court said: "Inasmuch, then, as the declaration distinctly alleges that the highway with the bridge in question

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was the *only* means by which the appellant had access to and egress from his farm and buildings, it shows on its face a special and particular injury inflicted on the plaintiff by reason of the non-repair of the thoroughfare; and it shows an injury differing in kind from that which other members of the community can suffer from the same cause. Of course, if the appellant—the plaintiff below—has any other way or road, by which he can get to and from his premises, he cannot maintain this action even though he is put to more inconvenience or is required to travel a much greater distance in using the other highway.”

As we have seen, this declaration alleges that this was the only county public road leading from Pumphrey’s station to the point where the piers were to be constructed, and that the plaintiff had no other access by the public highway to transport the material. It further distinctly alleges that he could not provide and transport to the place where the piers were to be constructed material other than that already provided, within the time required by his contract and for many days thereafter, and that he could not transport by any public highway the material already provided for said purpose to the place where the piers were to be built. The evidence shows that there was no other county road which he could use, and he was required to make arrangements with the railroad company to haul the material, which was done by running handcarts between the times of the regular cars coming and going every half hour on a single track, which caused a considerable loss of time and required the employment of more men. It was therefore alleged and proved that the plaintiff was deprived of the use of the only public county road which passed the points between which the material was to be hauled. It was also shown that the bridge was generally used by all the farmers in that section of the county in hauling their produce to Baltimore, but that there was a road that led from Pumphrey’s to Light Street Bridge which they could use, although it was two or three miles longer.

No authority has been cited, and we are satisfied that none could be, to show that the railroad which ran between the points named was such a road as would take the case out of the principle announced in *Bembe's Case, supra*. It might as well have been said that a boat could have been employed by Bembe to cross the waters over which the bridge had stood. The railroad track could not be used as a public highway by the plaintiff, and inasmuch as, according to the allegation in the narr. and the testimony, there was no other road over which the plaintiff could haul the material, the damage to him differed both in kind and degree from that which the general public suffered. There was, therefore, no error in the rulings on the prayers.

There were also several exceptions taken to the rulings on the testimony, but they were not pressed, and we see no error in them.

Judgment affirmed, the appellant to pay the costs, above and below.

IRON CLAD MANUFACTURING COMPANY *vs.*
THOMAS B. STANFIELD ET AL.

Building Contract—Substantial Compliance with Specifications—Recoupment for Deficiencies in Action for Contract Price—Measure of Damages—Instructions to the Jury—Evidence—Waiver of Exception to Testimony.

In an action to recover a balance due on a building contract, a prayer instructing the jury that if the plaintiff erected the building in substantial accordance with the terms of the contract, and it was used and accepted by the defendant, then the plaintiff is entitled to recover, is not open to the objection that it declares that a substantial compliance with the speci-

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fications entitles the plaintiff to the full contract price. This prayer goes simply to the plaintiff's right of recovery, and the measure of damages was dealt with in a subsequent instruction.

When the building as erected by a contractor is in substantial conformity with the specifications, but there are in it certain deviations and deficiencies, there should be deducted from the contract price the difference between the value of the building as erected and the value of the building contracted for, and the contractor is entitled to recover the contract price less that sum.*

When a contract calls for the erection inside of a building of a loading platform of the same height as the floor of freight cars on an adjoining track, then, if the owner requests that the construction of a platform be postponed until the elevation of the track is ascertained, the builder is not responsible for the delay so occasioned.

No deductions from the contract price of a building should be made on account of deviations from the specifications made by direction of the owner, or on account of damage to a wall in the building caused by a third party acting under the orders of the owner.

In an action to recover a balance due on a building contract, a prayer offered by the defendant instructed the jury that if they found that the plaintiff did not perform the contract in any one of ten enumerated particulars, they should deduct from the contract price the reasonable cost of putting the building in the same condition it would have been if the contract had been performed in all respects. *Held*, that this prayer was properly rejected because, as to some of these particulars, there was no evidence of a failure to comply with the contract, or in others as to what it would cost to make the building conform, and as to one of the particulars the requirements of the contract were not correctly stated.

*Appended to the case of *Foeller v. Heintz*, 24 L. R. A. (N. S.) 327, there is a note collecting many authorities upon the right of recovery when a building contract has been substantially but not completely performed; as to what constitutes substantial performance, and the measure of recovery.

A contract for the erection of a factory building provided that the owner should have the option of having a cement floor instead of a wooden floor at a designated additional cost. The owner afterwards elected to have the cement floor. *Held*, that the cost of a wooden floor should not be deducted from the contract price.

The contractor who erected a building when a witness in his action to recover a balance claimed to be due may be asked the following question: "Can you state whether or not, based on your experience as a builder, this building was put up in accordance with the written specifications, plans and the contract?" This was not a hypothetical question to an expert having no actual knowledge of the facts and designed to elicit a mere opinion; and it was followed up by questions as to each provision of the contract.

The objection to a question as leading must be made on that ground when the question is asked, so that the examining counsel may put the question in the proper form.

Exceptions to certain evidence will be treated as waived when that testimony is subsequently rendered immaterial by an instruction to the jury granted at the request of the exceptant.

It is within the discretion of the trial Court to refuse to allow questions to be asked on cross-examination relating to matters fully covered by testimony already in the case.

When the defendant alleged that a cement floor laid by the plaintiff was defectively constructed, the plaintiff may offer evidence to show in what way the defendant had himself damaged the floor after it was laid, and also evidence of admissions to that effect made by the agent of the defendant.

Decided January 12th, 1910.

Appeal from the Superior Court of Baltimore City (Stock-BRIDGE, J.).

The prayers referred to in the opinion of the Court are as follows:

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Plaintiffs' 1st Prayer.—At the request of the plaintiffs the Court instructs the jury that if they find that the plaintiffs and defendants entered into the written contracts dated April 20, 1905, and supplemental contract dated May 9, 1905, admitted in evidence, for the erection of a factory building at Bush and Wicomico streets, in Baltimore City, and thereafter the defendants elected to have a concrete floor placed in said building as provided for in said supplemental contract, and thereafter the plaintiffs constructed said factory building in substantial accordance with the terms of said contracts, and within a reasonable time, and that the said building was thereupon occupied and used by the defendants as a galvanizing factory and continued so to be used by them for several years thereafter, and was reasonably satisfactory and acceptable to said defendants, and there is a balance still due and unpaid by the defendants on account of the construction of said building, then the verdict of the jury shall be for the plaintiffs, the defendants admitting in open Court that no contention is made against the right of the plaintiffs to recover by reason of the lack of approval of the master mechanic of the defendants. (*Granted as modified.*)

Plaintiffs' 2nd Prayer.—That it being admitted there is some amount due the plaintiffs by both defendants on account of the contract offered in evidence, the measure of damages to be awarded the plaintiffs is as follows:

The amount of the contract price, to wit, \$12,900, less the payments on account made by the defendants, and less such sum, if any, as the jury may find should be deducted from the contract price on account of the defects, if any, found by the jury in said building, caused by the lack of workmanship on the part of the plaintiffs (or by the use of materials other and inferior to those specified in the contract), or any deviation from the plans and specifications not acquiesced in by the defendants and shown to have made said building less valuable to the defendants, together with interest at six per cent. in the discretion of the jury, on said balance, computed

from four months after the completion and acceptance of said building by the defendants. (*Granted as modified.*)

The part in brackets was inserted by the Court.

Plaintiffs' 3rd Prayer.—That if the jury find that the plaintiffs completed the building by July 1st, 1905, except as to the erection of the loading platform, and that the construction of said platform was postponed by request of the defendants, and was afterwards erected promptly upon request, and in the manner directed by the witness, Conn, acting under instructions from the defendants, then the jury may find that the building was completed July 1st, 1905, within the meaning of the contract. (*Granted.*)

Plaintiffs' 4th Prayer.—At the request of the plaintiffs, the Court instructs the jury that if they find for the plaintiffs, there should be no deduction made from the balance, if any, due under the contract price for deviations, if any, from the provisions of the contract, which were made by the plaintiffs in consequence of directions from the defendants or their duly authorized agents. (*Granted.*)

Plaintiffs' 5th Prayer.—That no deduction or abatement should be allowed the defendants for any damage to the wall of the factory erected by the plaintiffs for the defendants under the contracts in suit, if the jury find that such damage occurred to said wall by reason of any excavations made near to said wall for the installation of the railroad switch referred to in the testimony in this case. (*Granted.*)

Plaintiffs' 6th Prayer.—That no deduction or abatement should be allowed the defendants for any damage to the wall of the factory erected by the plaintiffs for the defendants under the contracts in suit, if the jury find that such damage occurred to said wall by reason of the sinking of the said wall, due to the character of the soil upon which said wall was built. (*Refused.*)

Defendant's 1st Prayer.—If the jury find that the three papers of April 20, 1905, offered in evidence, were all signed by the respective parties thereto, at the same time and place, then the jury are instructed that by the contract between the

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parties of April 20, 1905, and the subsequent contracts of May 6th and 9th, 1905, offered in evidence, and the letters from the defendant to the plaintiffs of May 10th, 1905, and June 5th, 1905, and the letter from Stanley McIntosh, purchasing agent of the defendant, to the plaintiffs of June 1, 1905, the plaintiffs agreed to do the following among other things: First, to guarantee the walls they were to put up against cracking or bulging for ten years, unless such cracking or bulging were caused by a cyclone or carelessness of defendant or an accident for which plaintiffs were not responsible; secondly, to guarantee the roof against leaking for ten years; third, to put skylights in the roof six feet by seven feet in size; fourth, to put as many skylights in the whole roof 6 by 7 as would give the same amount of light over the whole building that six skylights five feet by six feet would have given in the building first contracted for, viz. 58 feet by 105 feet; fifth, to use posts eight inches by ten inches in size; sixth, to put concrete foundation three feet deep under each post; seventh, to make a concrete floor throughout the building of the material and mix specified in plaintiffs' letter of May 10, 1905; eighth, that such floor would not show material defects within five years under the ordinary uses of a cement floor in such a factory building; ninth, to erect a loading platform seven feet wide of the same height as a floor of a freight car and to run slant from the height to the floor so that it will make it easy to load with hand trucks, along the whole length of the west side of the building; tenth, to furnish all material of the best quality of its specified kinds and to do all the work in the best workmanlike manner.

And if the jury find that the plaintiff did not perform their agreement in any of the particulars herein mentioned according to the contract, then the jury should deduct from the balance of the contract price unpaid, the reasonable cost of putting the building contracted for in the condition it would have been in if the plaintiffs had performed their agreement in all said particulars according to contract.

But if the jury find that in any particular the plaintiffs' failure to conform to the contract was assented to or waived by the defendants, then the jury should not allow any deduction for such failure in such particular to conform to the contract. (*Refused.*)

Defendant's 2nd Prayer.—If the jury find that the three typewritten papers each dated April 20, 1905, and offered in evidence, were all signed at the same time; and if the jury find that the typewritten papers of May 6th and May 9th, 1905, offered in evidence, were duly signed by the parties thereto, then the jury are instructed that the said papers and the drawings referred to in one of the papers of April 20, 1905, constituted a contract between the parties, and that by said contract the plaintiffs undertook that the work therein contracted for should be done in the best of workmanlike manner; and if the jury find that any of the work was not done in the best of workmanlike manner, and that by reason thereof there were defects or imperfections in said building which lessened the value thereof, then the jury are instructed that from the balance of the contract price remaining unpaid, the jury should deduct such sum as they may find the value of the building was lessened by reason of such defects or imperfections. (*Granted.*)

Defendant's 3rd Prayer.—If the jury find the execution of the papers forming the contract as mentioned in the first prayer, then the jury are instructed that by the contract the plaintiffs guaranteed the roof against leaking for ten years; and if the jury find that the roof has leaked, then the jury are instructed that they should deduct from the balance of the contract price remaining unpaid, the amount which the jury may find the value of the building was damaged by reason of the leaking of the roof. (*Granted.*)

Defendant's 4th Prayer.—If the jury find the execution of the writings mentioned in the defendant's first prayer, and shall further find that one or more of the walls of the building erected by the plaintiffs in pursuance of said contract have cracked, then the jury are instructed that they

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should deduct from the balance of the contract price remaining unpaid, the amount which they may find the value of the building to have been damaged by said cracking of the walls, provided the jury find that said cracking was not due to a cyclone or carelessness on the part of the defendant, and that the measure of such damage is the amount which the jury may find would have been a reasonable cost of putting said walls in a good and proper condition, such as they would have been if they had not cracked. (*Granted.*)

Defendant's 5th Prayer.—If the jury find that the plaintiffs agreed to put down a concrete floor for the defendant of the materials and proportions specified in the letter from the plaintiffs to the defendant of May 10, 1905, offered in evidence; and if the jury find that the plaintiffs agreed to guarantee said floor for five years; and if the jury find that within less than five years the said floor became cracked and soft, and that such defects resulted from unskilled or improper workmanship in the mixing or laying of said concrete floor, then the jury are instructed that they should deduct from the balance of the contract price claimed by the plaintiffs, such sum as they may find the value of the building was lessened by reason of such defects or imperfections. (*Granted as modified.*)

Defendant's 6th Prayer.—If the jury find under other instructions in this case, that the defendant is entitled to a deduction from the balance of the contract price remaining unpaid, because of the plaintiffs' failure to fully comply with the contracts on their part, then the jury are instructed that such deduction should be made from the principal of fifty-one hundred dollars (\$5,100.00) and interest allowed, if the jury see fit to allow interest, only on the balance so ascertained; and the Court instructs the jury that whether or not they shall allow any interest to the plaintiffs is a matter entirely in the discretion of the jury under all the circumstances of this case. (*Granted.*)

Defendant's 7th Prayer.—The Court instructs the jury that by a true construction of the several papers constituting

the contract or contracts between the parties, there should be deducted from the amount of the first contract, and hence from the amount now claimed by the plaintiffs, such sum as the jury may find would have been the reasonable cost of the wooden floor, contracted for in the first contract of April 20, 1905, the undisputed evidence being that said wooden floor was never put in. (*Refused.*)

The defendant excepts generally to the granting of plaintiffs' third prayer and especially on the ground that there is no evidence to sustain the following statement in said prayer: "That the construction of said platform was postponed at the request of the defendant, and was afterward erected promptly upon request." (*Exception overruled.*)

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE and THOMAS, JJ.

S. S. Field, for the appellant.

The question in the first exception was objectionable on two grounds: (1) Because it is leading; and (2) because it asked a witness, and that witness the plaintiff, to answer the precise question that the jury were to decide.

(1) The question palpably called for the answer yes (the answer was: "Yes, sir; it was"), and thus the question fits exactly the definition of leading questions, "which suggest to the witness the answer desired, or which embodying a material fact, admit of a direct answer by a simple yes or no, or which instruct a witness how to answer on material points." 2 *Poe Pl. and Pr.*, sec. 261; *Lee v. Tinges*, 7 Md. 234; 1 *Greenleaf Ev.*, sec. 434.

(2) The identical question which the jury were sitting to decide was whether "this building was put up in accordance with the written specifications and plans and the contract." The proper evidence was: (a) The contract, including of course, the plans and specifications; and (b) the facts as to what work and what kind of work the plaintiff did; and from such evidence it was the jury's function to say whether or

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Argument of Counsel.

not the building was put up in accordance with the contract; and permitting the plaintiff, as a witness to answer that precise question was a manifest invasion of the province of the jury. *Balto. Belt R. R. v. Sattler*, 100 Md. 306; *Consolidated Gas Co. v. Smith*, 109 Md. 198.

The plaintiffs' first prayer was misleading, because it was calculated to create the impression upon the minds of the jury that a substantial compliance with the contract by the plaintiffs would entitle the plaintiffs to the full contract price; which is not the law. In order to entitle the plaintiff to sue upon the contract and claim the full contract price, he must show a full compliance on his part, though if he shows a substantial compliance, and the building is accepted by the defendants, he is entitled to recover under the common counts, the contract price less a reasonable deduction for defects or variations from the contract. 30 *Enc. of Law*, 2d ed. 1221; *Presbyterian Church v. Hoopes*, 66 Md. 598; *Pope v. King*, 108 Md. 46. Said prayer is also objectionable, because it does not in itself or by reference to any other prayer give the jury any guide as to the amount of the damages. *W. M. R. R. v. Martin*, 110 Md. 563.

The second prayer is misleading because of the direction to the jury to allow the balance of the contract price less deductions for defects in the work caused by "lack of workmanship on the part of the plaintiffs or by the use of material other and inferior to those specified in the contract." The defendants were entitled to deductions for any defects or deficiencies in the completed building from what the contract called for, no matter how caused. The plaintiffs themselves didn't do any of the work on the building, and a great deal of it was not even done under their direction, but was let out by sub-contracts, and therefore to confine the attention of the jury to defects caused by the "lack of workmanship" on the part of the plaintiffs, seems to us, misleading.

Again, the phrase "lack of workmanship" refers to the plaintiffs' capacity or skill; whereas, the true issue in every case, and in this case, is not whether the men who did the

work were skilful mechanics, but whether they properly used that skill in performing this particular contract.

In other words, the issue in such a case is not deficiency or unskilfulness in the workmanship, but defect in the work: and, as everybody knows, a skilful workman sometimes does bad work, the prayer ought to have confined the attention of the jury to the character of the work and not to the workmanship of the parties who did it, and specially ought not to have confined them to the lack of workmanship on the part of the plaintiffs, who themselves, did none of the work.

Again, the prayer allows deductions for any deviation from the plans and specifications not acquiesced in by the defendants, and shown to have made said building less valuable to defendants.

We submit that that phrase was also misleading. Defendants might acquiesce in a very substantial deviation from the contract in the sense of accepting and using said building; they would thereby make themselves liable on a *quantum meruit*, but they would not be liable for the whole contract price, if there were defects and deviations from the contract.

Again, we submit that the phrase "shown to have made said building less valuable to the defendants," is not the true theory of deduction for defects. For example, it may be that a factory building of this kind would be just as valuable with a dry sand floor that would cost perhaps \$500 as with a concrete floor which was to cost \$2,800; and yet, nobody would say that if the plaintiffs had simply put in a sand floor and the defendants had accepted and used the building that they would be obliged to pay the \$2,800 that they had promised to pay for the concrete floor.

The plaintiffs' third prayer was bad, because there was no evidence to sustain the statement therein "that the construction of said platform was postponed by request of the defendants and was afterward erected promptly upon request:" which objection is embodied in defendants' special exception.

The plaintiffs' fourth prayer was misleading and bad, because it told the jury that there should be no deduction from:

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the balance of the contract price for any deviation from the contract made by direction of the defendant or their duly authorized agent. This expression, agent, referred to Mr. Conn (because there was no pretense of any evidence that deviations were made by direction of any other agent), and Mr. Conn had no such authority.

The defendants' first prayer should have been granted.

(1) It contained a clear and distinct statement to the jury of what the contract required the plaintiffs to do, which is not contained in any other prayer. The defendants were entitled to have the Court instruct the jury as to the meaning of the contract and the rights and liabilities of the parties thereunder. 11 *Enc. of Pl. and Pr.*, pages 78-80; *Osceola Tribe v. Rost*, 15 Md. 295.

Again, it laid down the true measure of damages, namely, that the jury should deduct for defects if so found, from the balance of the contract price, the reasonable cost of putting the building contracted for in the condition it would have been if the plaintiffs had built it according to contract.

The Court refused this prayer, and by the other prayers instructed the jury that the deduction which they may make for defects would be the difference in the value of the building as constructed, and its value if it had been constructed according to contract.

(1) The Court had ruled early in the case that the plaintiffs could not prove the value of the completed building, under a theory of *quantum meruit*, upon the ground, as defendants' counsel understood it, that there being a written contract in this case specifying the price of the work, if done according to contract, the measure of recovery must be that contract price, less allowances for defects or variations and that the measure of recovery could not be shown by showing the value of the work as done.

The defendants, therefore, proceeded upon what they understood to be the Court's ruling, to prove the defects and what it would cost to make the building conform to the contract, and particularly with regard to the concrete floor. They

proved by two witnesses that the floor was defective, and that the only way to remedy it would have been a new topping. and that would have cost about \$1,400.

And the defendants did not put in any evidence, nor was there any in the record as to the difference in the value of the great big factory building with a good concrete floor, such as the contract called for, and a factory building with a concrete floor cracked and soft, such as the plaintiffs put in; the jury might have been satisfied that the floor was imperfect; they may have been satisfied that it would cost \$1,400 to make it conform to the contract, and they might have been willing to have given the defendants that deduction for that item alone; yet, the modification of the fifth prayer by the Court emphatically told them that they could not act upon that evidence, and, as above stated, there was no evidence which would guide them to arrive at any particular sum under the prayer as modified by the Court.

Even if the principle of deduction which the Court inserted in the prayer were the correct one, it was not correct in this case because defendants had been led by their understanding of the Court's rulings during the plaintiffs' case, to put in their evidence upon one theory, and to omit to put in any evidence upon the other theory to which the Court's instructions at the end of the case confined the jury.

The principle for the allowance for defects, which the Court instructed the jury should govern, is not the correct principle, but the correct principle is that laid down in the defendants' first prayer which was refused, and in the defendants' fifth prayer as presented, namely, to deduct from the contract price the amount that it would have reasonably cost to have made the building conform to the contract.

In 30 *Enc. of Law*, 2d ed. 1222, the rule is thus stated: "As a general rule, the amount to be allowed to the builder in case of a substantial performance is the necessary cost of remedying the defects or omissions in performance; but when the cost of remedying the omission would be very large as compared with the benefit which would be derived therefrom

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by the builder, he has been allowed as a deduction only the difference in the value of the work as done, and its value if it had been done in strict compliance with the contract." (In this "builder" means owner.)

The learned judge below rejected what the Encyclopedia states is the rule, and adopted what is stated to be the exception. In *Huysler v. Owen*, 61 Mo. 274-5, the Court says: "When the building has been completed, but differs in plan of construction or in material employed from that which the builder contracted to erect, and this is the only element of damage, and there has been no waiver, the true rule for estimating the damages sustained by the owner, whether the action be for the contract price or for the value of the labor and material, is to ascertain what it will cost to make the building conform to what the builder contracted it should be."

The rule as laid down in the Encyclopaedia and in *Huysler v. Owen*, has been approved and applied in *Central Trust Co. v. Arctic Ice Mach. Co.*, 77 Md. 238; *Filston Farm v. Henderson*, 106 Md. 379; *United Surety Co. v. Summers*, 110 Md. 99 (see pliffs' 1st prayer, 99-100, approved 123); *Keeler v. Herr*, 157 Ill. 59-60; *Butler v. Co.*, 130 U. S. 526-7; *Beha v. Ottenberg*, 6 Mack. (D. C.) 348; *Flaherty v. Miner*, 123 N. Y. 388; *Aetna Iron and S. Works v. Kosuth Co.*, 79 Iowa, 45-6; *Sheppard v. Mills*, 70 Ill. App. 75; *Stickler v. Overspeck*, 127 Pa. St. 446, 450 (approved in 146 Pa. St. 502); *Cook v. Co.*, 93 Ill. App. 301.

W. Calvin Chesnut and *J. Morfit Mullen*, for the appellees.

The plaintiffs' second prayer is based upon the correct rule of damages, which is as follows:

When a building is put up under a contract in substantial compliance with the contract, but varying in some unessential particulars, and when it has been accepted by the owner. if the builder or contractor has unintentionally or inadvertently failed in some particulars to perform the contract—but has acted in good faith—he is entitled to recover the full contract price less such sum as should be deducted therefrom to

compensate the owner for the loss in value of the building actually constructed as compared with the value of the building contracted for.

There is no question in this case as to the good faith of the plaintiffs. The defendants admit this.

The appellants contend that in the case at bar the proper rule is not as just outlined, and they say that they should be allowed to deduct from the contract price such a sum as will pay for altering the building as actually constructed to make it conform in every detail to the precise specifications of the building contracted for.

It is clear that there are many cases where these two rules could be used interchangeably, because under many states of facts no difference in consequences flow from applying either one or both. As an instance, take the case of where A. agrees to build B. a house for \$10,000, and it is specified that of this \$10,000, \$500 should be spent in papering the interior. If A. completes the house except for the papering, which he omits entirely to do, it is immaterial to either A. or B. whether you say the measure of damages is \$10,000 less \$500—*i. e.*, the difference between the value of the house contracted for and the one actually built—or that A. can recover the contract price, \$10,000, less what it would cost to make it conform to the contract—because neither A. nor B. has incurred the \$500 expense.

But if you take the situation where B. has spent \$500 in papering, as the contract required he should, but he has inadvertently failed to comply precisely with some unimportant details of the papering specifications, it is not sound justice to permit B. to deduct the full \$500. And this is what the appellants contend for.

The plaintiffs' 2nd prayer and defendant's 2nd prayer state the same proposition of law; there was therefore no error in granting the plaintiffs' second prayer. The defendants' first and fifth prayers (the latter before the modification) either stated a rule of law inconsistent with or the same as defendants' second prayer. In either event there was no

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error in rejecting the defendants' first prayer, and in modifying the fifth prayer.

The principles controlling such a situation are settled in the Maryland practice by the following authorities: *Pa. Ry. Co. v. Cecil*, 111 Md. 288; *Spencer v. Trafford*, 42 Md. 1-21; *Young v. Mertens*, 27 Md. 114; *Harford County v. Wise*, 71 Md. 43.

Even if this Court, after reviewing the reasons assigned should think that, in this case the appellants can still question the propriety of setting out the rule of damages as outlined by the trial Court, it will be apparent from a review of all the authorities dealing with the question that the lower Court has correctly stated the law. 2 *Sedgwick on Damages*, secs. 616 and 617; *Small v. Lee*, 61 S. E. 831; 4 Ga. App. 395; *Norcross Bros. v. Vose*, 85 N. E. 468 (Mass.); *Gleason v. Smith*, 9 Cushing (Mass.) 484; *Madisonville v. Rosser & Castoe*, 8 Ohio C. C. 387; *Pinches v. Swedish Lutheran Church*, 55 Conn. 186; *Manning v. School District No. 4*, 124 Wis. 84.

These authorities unequivocally maintain the proposition, that where a building has been substantially constructed in accordance with the contract requirements, but varies in some unessential particulars, and it has been accepted by the owner, the measure of damages, if the contractor has acted in good faith, is the full contract price less such sum as should be deducted to indemnify the owner for the deviations from the plans and specifications. They discuss the difference between this rule, and the rule contended for by the appellants, that the measure of damages is the cost of making the building actually constructed, correspond precisely with all the details of the plans and specifications. The principle involved in all of these authorities is, that, in those cases where it would be unjust to apply the rule contended for by the appellants, a Court of law will not work a hardship upon one who has contracted to build a house or other structure, merely because he does not comply in detail with all contract requirements, if he has acted in good faith. The proper

measure of damages is the difference between the value of the building as contracted for, and as actually constructed, without reference to what it would cost to make it correspond to the precise requirements of the plans and specifications.

It is pointed out in *Sedgwick on Damages, supra*, that there is a distinction between the measure of damages, and the manner in which the amount of damages is proved. The measure of damages means the rule of law applicable to a certain state of facts, laid down as a standard to guide the jury in determining the amount of recoupment, if any. The manner of proving the damages is, of course, quite different from the measure of the damages; the former refers only to the character of the evidence that is to be adduced in order to show the facts of each particular case. The rule of law (*i. e.* the measure of damages) is the same in all cases, but the nature of the proof to be adduced varies with the facts of each particular case.

There are many cases (for instance—where a part of the building, which can be easily supplied, such as a cement floor—has been entirely omitted) where it would be proper to give evidence of what it would cost to complete the building in the omitted particular. In such a case allowing the measure of damages to be dependent upon the cost of completing the building, works no hardship upon anybody.

Some of the authorities, therefore, state both of the two rules, the one as we contend for, and the other as the appellants contend for (see *Brantly on Contracts*, pages 218-219). And in some of the authorities, the rule is stated as we contend for, without referring to the propriety of allowing evidence to show what it would cost to complete the building, to make it as contracted for. *Cullen v. Sears*, 112 Mass. 299; *Kane v. Stone Co.*, 39 Ohio State, 1; *Woodward v. McGuire*, 3 *Murphrey* (N. C.) 501.

Other cases state the measure of damages is what it would cost to make the building correspond precisely with the plans and specifications of the contract. We have found no case maintaining the proposition that where it would work a hard-

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ship upon the contractor to make the building comply with the precise requirements of the contract, if he has varied in some unessential details, and did so in good faith, the proper measure of damages is to be considered with reference to the cost of making the building as constructed correspond to the precise contract requirements. All the authorities are unanimous in holding that, where it would work a hardship upon the contractor who has acted in good faith, to make the building correspond precisely with the contract requirements, if it has been accepted by the owner and varies in unessential particulars, the proper rule of damages is to allow the owner to deduct merely the difference in value between the building contracted for, and the one actually constructed.

The case of *Small v. Lee*, 61 S. E. 831, 4 Ga. App. 495, involved the very question presented in the case at bar. The principle was fully discussed and the Court decided in favor of our contention. Say the Court in the course of the opinion: "Where the defects in the house as constructed may be remedied at a reasonable expense, it would be proper, we think, to deduct from the contract price the sum which it would cost to complete it according to the requirements of the plans and specifications. *Blakeslee v. Holt*, 42 Conn. 226. If the contractor has built a structure substantially adapted to the purposes for which it was built and of which the owner is in the use and enjoyment, but the defects of the structure cannot be made to conform strictly to the requirements of the contract, except by an expenditure which would deprive the contractor of adequate compensation for his labor and materials, justice and equity would require the adoption of another measure of damages.

"In this case the contractor did not wilfully deviate from the plans and specifications, but built a house according to his construction of the measurements and rooms required. The house was in every respect a compliance with the contract, except that it failed to make the rooms and veranda of such dimensions as the owner of the house wanted, and what she insisted she was to receive. She accepted the house and

occupies it as her residence, and has thus received from the contractor a substantial benefit from his labor and materials. We do not mean to say that she has, by accepting the house, waived her right to any damage which she has incurred by reason of the contractor's failure to comply with the plans and specifications in reference to the dimensions of the rooms; for, notwithstanding the fact that she received the house and is occupying it, she is still entitled to be in the same condition financially as she would have been had the contract been fully performed by the contractor. She has a right to a house as good as that which the contractor agreed to furnish, but the assertion of her right should be in such a manner as not to deprive the contractor of a fair and just compensation for his labor and materials. Under the facts of this case, we think that the true measure of damages, and one which would not be unjust in its application to either party, would be the difference between the value of the house as finished and the house as it ought to have been finished. To require that the house should be rebuilt, and that the contractor should pay the cost of rebuilding; or that the estimated cost of making the house conform to the contract should be allowed as damages, would be to give an unconscionable advantage to the owner; and would deprive the contractor of adequate compensation for his work and materials." See also *Gleason v. Smith*, 9 Cushing.

In *Norcross Bros v. Vose*, 85 N. E. (Mass.) 468, the question before the Court was as to the proper rule of damages for failure to construct a cement floor and to put on the topping properly. The Court held in substance that the general rule of damages was to deduct from the contract price of the floor the lessened value of the floors as they were actually constructed (just as we contend for). If the only feasible way to make the floors serviceable was to resurface them (and this is not our case because defendants in the case at bar used the floors for three years), then the jury could allow as damages the cost of resurfacing, but if resurfacing was inexpedient, the jury must reject the consideration of this cost.

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As far as we know, there are no cases decided in Maryland that deal with the precise proposition now being discussed; but our situation is like the case of an article contracted to be sold with a warranty of soundness or fitness, when the article sold does not comply with the warranty. It is well-settled in Maryland, in cases of this kind, that when the article sold has been accepted, the measure of damages is the difference between the value of the thing warranted, with the defects warranted against, and the value it would have had without such defects—that is, the defendant is allowed to recoup the difference between the value of the thing contracted for and the thing actually supplied—just as we contend for. *Horn v. Buck*, 48 Md. 358, 372; *Lane v. Lantz*, 27 Md. 216.

The kernel in the nutshell of all the law dealing with this point is that the rule we contend for is a rule of law; the question as to the cost of making a building conform to precise contract requirements, is always one of evidence merely. Whether or not such evidence can be considered in a particular case depends upon its own facts. The test to be applied in each case is: Does, under all the facts of the case, it work a hardship upon the contractor?

That it would work a hardship and a great injustice upon the plaintiffs to allow the defendants the rule they contend for in the case at bar, appears from the following reasons:

First. The defendants in this case have sold the building, which is the subject-matter of this suit, and have suffered no real loss in so doing. The defendants therefore, would be in no better position, if they were allowed to recoup the actual cost of putting in a new top to the cement floor. It makes no difference to them whether or not the building now complies with precise contract requirements, provided they are allowed an opportunity to recoup any financial loss that they may claim to have suffered. Such an opportunity was given them before the jury.

Second. The measure of damages proposed by the appellants is not based upon an outlay that they have actually

made, and the Court has not before it a case where in order to make the building correspond to contract requirements, the defendants have suffered actual loss in spending money to have the building measure up to what they specifically contracted for. If these defendants had actually spent \$1,500 or \$1,700 to make the cement floor comply in each precise detail with the one referred to in the contract, and had been compelled to do so to have a serviceable floor, this Court would have an entirely different case before it, but the fact is that a cement floor was built in substantial compliance with the contract requirements, and that the defendants had the use of it and that, from all that we know to the contrary, it answered all of their needs during the whole of the period in which they owned and used the building contracted for.

Third. The contention of the appellants ignores the fact that a cement floor was built which apparently satisfied the needs of the appellants during the time that they used the building, and that no credit is given the appellees for the cement floor as actually constructed, including both the base and the topping, both of which were used during the whole period of the ownership and use of this building by the appellants.

Fourth. The testimony in the record by the witnesses for the appellants as to what it would cost to make the cement floor correspond with the precise contract requirements is all arrived at by estimates made almost four years after the completion of the contract, and it is submitted that this estimate of the defendants, tending to show the cost of making the floor conform to contract requirements, is purely speculative.

SCHMUCKER, J., delivered the opinion of the Court.

The appeal in this case is from a judgment of the Superior Court of Baltimore City in an action of assumpsit on a building contract. The declaration contains the common counts together with a special one on the contract. The case was tried, on an issue joined on the general issue pleas, before a

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jury which rendered a verdict for the plaintiff. From the judgment entered on that verdict the appeal was taken.

It appears from the record that on April 20th, 1905, the appellecs, Stansfield & Son, who were builders and contractors of long experience in Baltimore City, entered into a contract with the Iron Clad Manufacturing Company, a New York Corporation, for the erection in Baltimore of a one-story factory building 58 feet wide by 105 feet deep to be used in the manufacture of galvanized or enameled ware. The contract was not drawn in formal style but was entered into by means of written proposals and acceptances simultaneously made by the respective parties. No formal plans or specifications accompanied the contract but the several written documents of which it was composed contained a variety of provisions which taken together may be regarded as tantamount to a set of specifications.

These specifications called for a brick building, of the dimensions mentioned, with a slag roof to be guaranteed against leakage and wooden floor to be constructed according to the specifications, the material to be of the best quality, of its specified kinds and the work to be done in the best workmanlike manner. The building was to be completed, in two weeks from the time of starting work on it, and was required to be satisfactory to the company for which it was erected and meet the approval of its master mechanic. The contract price for the complete building was fixed at \$2,900.

After the building had been commenced the company, having acquired more land adjacent to the lot on which it was being erected, desired to have a larger factory. A supplemental contract was accordingly made between the parties, on May 9th, 1905, by written proposal and acceptance for constructing the proposed building of substantially the character originally intended but of the dimensions of 276 feet by 105 feet at an additional cost of \$7,200 with the option to the company of having a cement floor at the further cost of \$2,800. The company having elected to have the cement floor, the total contract price became \$12,900.

The supplemental contract was in reality made with the Iron Clad Company of Maine which had in the meantime been formed by the persons interested in the New York corporation, but no complication results from that circumstance as both corporations admitted in open Court their joint liability for whatever was justly due under the contract.

The building was erected and taken possession of by the companies and used for the manufacture of their wares, and payments were made by them on account of its construction. The suit was brought for an alleged balance of \$5,100 of the contract price.

There is evidence in the record tending to prove that the plaintiffs had complied with all of the provisions of the several contracts on their part and also evidence of a contrary tenor. The defendant companies sought during the trial below to recoup from the contract price for alleged defects in the work and deviations from the contracts.

At the close of the case below the plaintiffs offered six prayers and the defendants offered seven. They will be set out in the report of the case by the Reporter.

The Court granted the plaintiffs' third, fourth and fifth prayers in the form in which they were offered and their first and second prayers, after modifying them in certain respects, and rejected their sixth prayer.

The defendants' first and seventh prayers were refused and their second, third, fourth and sixth prayers were granted as offered and their fifth prayer was granted as modified by the Court.

The appellants' criticism of the plaintiffs' first prayer as granted is that it was misleading and calculated to create the impression upon the minds of the jury that a *substantial* compliance with the contract by the plaintiffs would entitle them to the full contract price. We do not think that the prayer is fairly open to that objection. It instructs the jury that if they find from the evidence that the plaintiffs constructed the building in substantial accordance with the terms of the contracts and that the defendants had occupied and used it

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as a galvanizing factory and that it was reasonably satisfactory and acceptable to them and that there was a balance due on account of its construction then their verdict should be for the plaintiffs, the defendants having waived in open Court the requisite of approval of the building by their master mechanic. The prayer does not base the plaintiffs' right of recovery upon the single ground of an erection of the building in substantial accordance with the terms of the contract but required the jury also to find that the defendants had accepted and used it for the purpose for which it was erected and had found it reasonably satisfactory and acceptable. The prayer does not say that the jury should allow the plaintiffs the full contract price if they found the facts upon which it is predicated. It goes simply to the plaintiffs' right of recovery. It and the second prayer together make full and just provision for proper reductions in arriving at a verdict from the contract price, for any defects in the building which the jury might find to exist.

The question of the measure of damages is dealt with in the second prayers of the plaintiffs and defendants, which in effect state the same rule upon the subject although their statements of it differ slightly in form. Both of the prayers provide for the finding by the jury of the existence of defects in the building caused by lack of workmanship or inferior material used, or deviations from the plans and specifications not acquiesced in by the defendants. The plaintiffs' prayer directs the jury, in arriving at their verdict, to deduct from the unpaid balance of the contract price, a sum equal to the extent to which any such defects and imperfections "have made said building less valuable to the defendants." The defendants' prayer directs the jury to deduct from the balance of the contract price remaining unpaid "such sum as they may find that the value of the building was lessened by reason of such defects or imperfections." Both the plaintiffs and defendants, in these prayers stating the measure of damages, adopt the contract price as the standard and direct that the defendants be compensated for defects or imperfections

in the building by deducting from the unpaid balance of the contract price the amount that the value of the building was lessened by the defects or imperfections.

The measure of damages under the facts of this case was in our opinion correctly stated in those two prayers, but in any event the appellants cannot complain of the granting at the instance of the plaintiff, of essentially the same instruction which was granted at their own request to them as defendants, not only in their prayer now under consideration but also in their third and fifth prayers.

We find no error in the action of the Court in granting the plaintiffs' third prayer. Nor can we agree with the appellants that the record contains no evidence to sustain the statement in that prayer "that the construction of the said platform was postponed by request of the defendants and was afterwards erected promptly upon request." The contract called for the erection inside of the building of a loading platform, of the same height as the floor of a freight car, to facilitate the handling and loading of freight. The record contains the evidence of J. Elmer Stanfield one of the plaintiffs that the loading platforms were put up as soon as the defendants had the railroad tracks run alongside of the building and that it was impossible to construct them sooner as until the elevation of the tracks was fixed it could not be determined how high to make the loading platforms. He further testified that the defendants "wouldn't allow him to put the risers in until the siding was in because they wanted them level with the bottom of the cars." There is evidence in the record that the "risers" were platforms at each door, on the side of the building next to the car track, which were substituted for the long platform at the suggestion of Mr. Conn, the superintendent of the defendants' factory, who testified that the defendants had approved the change.

The plaintiffs' fourth and fifth prayers correctly state the law with reference to the matters to which they respectively refer.

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The defendants' first prayer was properly rejected. It instructed the jury that if they found that the plaintiffs did not perform their agreement in any one of ten particulars, which it stated in separate numbered paragraphs, they should deduct from the unpaid balance of the contract price the reasonable cost of putting the building contracted for in the same condition as if the plaintiffs had performed their agreement in all particulars. Now as to some of these enumerated particulars there was evidence tending to show a failure to fully meet the requirements of the contract and also evidence tending to show what it would cost to make the building conform to the contract in these respects, while as to others of the particulars there was no such evidence at all. Again the fourth of the enumerated particulars, to the performance of which the prayer holds the plaintiffs, is not correctly stated therein. As stated in the prayer it is "to put as many skylights in the whole roof 6 by 7 as would give the same amount of light over the whole building that six skylights five feet by six feet would have given in the building first contracted for, viz, 58 feet by 105 feet." What the contract of May 9th, 1905, which provides for the erection of the enlarged building says in that respect is "I will make the skylighting six by seven feet throughout the building and will have enough skylights to make the building perfectly light so that your men can work in any part of the building without using artificial light."

We find no error in the rejection of the defendants' seventh prayer. It undertakes to so construe the contracts as to give to the defendants the benefit, of what the wooden floor called for by the contract of April 20th, 1905, would have cost, as an incident of their election to have a cement floor in the entire building. The appellees in the offer to erect the building say in plain English that if the defendants "decide to use a cement floor throughout the new factory building as well as the factory building in the first contract I made with you I will charge \$2,800 extra." The written acceptance of that offer by the appellants appears on its face. No allowance

of cost for the wooden floor is mentioned or suggested. The Court cannot make a different contract, for the parties, from the one which they have themselves made.

We find no error in the Court's action in making modifications in certain of the granted prayers as they were put in shape thereby to fairly present the law of the case to the jury.

The record contains fifteen exceptions to rulings on evidence. The first exception is to the overruling of the defendants objection to this question put to the plaintiff on his own behalf. "Can you state whether or not based on your experience as a builder this building was put up in accordance with the written specifications, plans and the contract?" The record does not show that the grounds of the objection were stated when it was made but it is now contended that it was objectionable because it was leading and also because it asked the witness the very question that the jury were to decide.

It is too late now to raise for the first time the objection that the question was leading. That should have been raised below when the question was asked so that the examining counsel could have put the inquiry in a proper form if he desired to do so. *Poe's Practice*, sec. 274; *Brown v. Hardcastle*, 63 Md. 495; *Kerby v. Kerby*, 57 Md. 361.

The other ground of objection to the question was also untenable. In the cases of *Balta. Belt R. R. v. Sadtler*, 100 Md. 306, and *Con. Gas. Co. v. Smith*, 109 Md. 198, on which the appellant relied in this connection, we held that *experts* could not be allowed to express a mere opinion upon the very question which the jury are to decide as that tends to substitute the opinion of the expert for that of the jury which the litigants are entitled to have. The witness here was not a mere expert. He was the contractor himself who had actual knowledge of whether the work called for by the contract had been done. The question it is true asked for an answer based on his experience as a builder but it was not a hypothetical question put to an expert having no actual knowledge of the facts to elicit from him a mere opinion. The record shows

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the question to have been a formal or opening one as the witness was then asked separately in reference to the plaintiffs' compliance with all of the provisions of the contract on their part. Under these circumstances we find no reversible error in the ruling in that exception.

We do not notice in detail the second exception because the record does not show that the question objected to was answered and also because the same question appears to have been afterwards put to the witness without objection and answered.

Nor do we regard it as necessary to comment in detail upon the rulings upon the questions put to the witness Conn which form the basis of the third to the eighth exceptions inclusive, nor upon the Court's action upon the question put to the witness Stanfield presented by the twelfth exception. All of those rulings were rendered immaterial by the subsequent waiver in open Court by the defendants of the provision of the contract requiring the approval of the building by their master mechanic.

The ninth exception was taken to the refusal of the Court to permit the defendants to ask the witness Stanfield upon cross-examination a question based upon a statement made in a letter from the general manager of the defendants in New York to their Baltimore office. The subject-matter to which the question related had been well covered by the previous testimony of the witness as well as by that of Conn the factory superintendent and we do not think the trial Judge at all exceeded his legitimate control of the limits of cross-examination in the ruling to which this exception was taken.

The plaintiffs asked their witness Stanfield on re-direct examination "Do you know whether this company, the Iron Clad Company used material there that would damage a cement floor?" He answered, "Yes, sir; I do." He was then asked, "What did they use?" The defendants objected to the question but the Court overruled the objection. The ninth exception was taken to that ruling. There was no error in

permitting the question to be asked. The defendants had contended, and offered evidence in support of the contention, that the cement floor had been defectively constructed. The answer of the witness tended to show that the alleged defects in the floor were due to the spilling on it of acids used by the defendants' employees in the processes of manufacture carried on by them. It was quite within the discretion of the trial judge to allow the question to be put. *N. Y. P., etc., Ry. Co. v. Jones*, 94 Md. 24-35; *Blake v. Stump*, 73 Md. 160; *Miller v. Leib*, 109 Md. 414.

The eleventh exception was to the Court's refusal to strike out the following answer of the witness Stansfield, which had been admitted subject to exception. "Mr. Conn told me it was due to the acid and stuff they used in there for the pickling; he said they couldn't help it; that they were bound to get it over the floor. He said, that will have to go, just that way. He said that it was no fault of mine."

In view of the fact that the witness Conn had been shown to be in charge of the defendants factory and the processes in operation there, we think the evidence was admissible as tending to show an admission on their part that the floor had been injured in the manner stated in the answer.

Without reviewing in detail the rulings on evidence which form the subjects of the thirteenth, fourteenth and fifteenth bills of exception, we say that we have examined all of them and find no reversible error in them.

Finding no reversible error in any of the actions or rulings of the Court below we will affirm the judgment.

Judgment affirmed with costs.

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Syllabus.

THE AETNA INDEMNITY COMPANY vs. THE BAL-
TIMORE, SPARROWS POINT AND CHES-
APEAKE RAILWAY COMPANY.

*Bond Executed by Surety and Delivered to Obligee Without
Execution by Principal—Mistake—Reformation in
Equity—Hearing on Bill and Answer.*

If a surety executes a bond and gives it to the principal to be executed by him, and then to deliver it to the obligee, and the principal does so deliver it, having simply overlooked the fact that he had not executed it, and the obligee accepts it, believing it was properly executed, not observing the failure of the principal to sign it, all three parties believing that it had been regularly executed and intending that it should be, equity has jurisdiction to correct the mistake by compelling the principal to execute the bond.

When a Court of equity reforms a written instrument it can enforce it as reformed, administering full relief.

The C. Company agreed to do certain construction work for a railway company, under a contract which provided that the C. Company should give a bond conditioned for its due performance of the contract. Thereupon, the C. Company gave to the railway company a bond executed only by the Aetna Company as surety, but designed to be executed by the C. Company as principal. The omission of the C. Company to sign the bond was not then noticed by the railway company, and the work was begun. Afterwards the railway company, alleging that the C. Company had failed to comply with its contract, rescinded the same and employed a third party to finish it at a cost in excess of the original contract price. The C. Company having been placed in the hands of a receiver, the railway company brought an action on the bond against that company, the receiver and the Aetna Company as surety. When it was discovered that the bond had not been signed by the officers of the C. Company, the bill in equity in this case

was filed, asking the Court to direct these officers to execute the bond, alleging that the omission so to do was the result of an oversight. The C. Company admitted the allegations of the bill, but the Aetna Company, which had been made a party defendant, filed an answer alleging that the execution of the bond by the C. Company was a condition precedent to liability on its part, and a condition upon which it was delivered to that company; also that the bond was void as to it and that the plaintiff had been guilty of laches. The answer also denied some of the allegations of the bill, and alleged that the Aetna Company had never consented to be bound until after execution by the C. Company, nor to a delivery of said bond prior to such execution, and since said bond was never executed by the C. Company it was a nullity. *Held*, that since the case was heard on bill and answer, when the averments of the answer must be taken as true, the trial Court erred in decreeing the relief asked for, as it does not clearly appear that the railway company is entitled to relief against the defendants.

Held, further, that the cause should be remanded, to the end that the bill may be amended and testimony taken, and if it be established that the railway company is entitled to have the bond corrected, the Court may dispose of the whole matter in the equity cause.

Decided January 11th, 1910.

Appeal from the Circuit Court of Baltimore City. (HEUISLER, J.).

The cause was argued before BOYD, C. J., PEARCE, SCHMUCKER, BURKE, THOMAS and PATTISON, JJ.

George Whitelock and John B. Deming, for the appellant.

Geo. Dobbin Penniman (with whom was *Joseph C. France* on the brief), for the appellee.

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Boyd, C. J., delivered the opinion of the Court.

This is an appeal from a decree directing the Constructing Engineers' Company and its president and secretary, to execute, reform and complete a bond to the Baltimore Sparrows Point and Chesapeake Railway Company from the Constructing Company, as principal, and the Aetna Indemnity Company, as surety. The bill alleges that the Constructing Company had a contract with the Railway Company to build an electric railway, by which the Constructing Company was required to furnish a bond in the penalty of \$10,000; that it delivered to the plaintiff, the railway company, a bond with the Aetna Company as surety, which was accepted, but the Constructing Company did not execute it; that the Constructing Company undertook the work, but the railway company finding it could not complete it according to the terms of the contract entered into a supplementary agreement with it, whereby the railway company was authorized to co-operate with it in the completion of the work; that the plaintiff caused the Constructing Company to procure on the same day a writing from the Aetna Company, consenting to the execution of the agreement by the railway company and the Constructing Company * * * the Aetna Company stipulating that its liability should in no event exceed \$10,000, as stated in the bond; that a receiver was afterwards appointed for the Constructing Company, but he was not authorized to proceed with the work and the railway company was compelled to enter into an agreement with other contractors for its completion. It also charges that, by reason of having the work completed during winter months, it was much more expensive than it would otherwise have been, and that it cost \$18,000 more than the Constructing Company was to receive for it; that a suit at law was brought on the bond, and that within two weeks prior to filing the bill in equity, it was discovered that the bond was not executed by the Constructing Company * * * it being claimed that when the Constructing Company delivered it to the railway company it was not noticed that it had not been executed by it,

and it was placed with the records of the railway company for safe keeping. The bill was filed to require the Constructing Company to complete the execution of the bond, as it was intended and supposed to be. The bond is dated July 17th, 1905, and the bill was filed March 20th, 1909, against the Constructing Company, its president and secretary, and the receiver.

On April 14th, 1909, the Aetna Company filed a petition in the equity case, asking to be made a party defendant, and to be given an opportunity to appear and answer, which was granted. The receiver answered, stating that he was informed and believed that it was the intention of the Constructing Company to deliver a good and sufficient bond, and the Constructing Company, and its president and secretary, also admitted that such was the intention, and that they thought it had been properly executed before it was delivered. The Aetna Company filed a separate answer, in which it denies many of the allegations of the bill, and neither admitted nor denied others. It alleges that the execution of the bond by the Constructing Company was a condition precedent to liability on its part, and a condition upon which it was delivered to that company. It alleges laches, and that the bond is void and of no effect as to it. It explains the supplemental agreement by saying that it entered into it in the mistaken belief that the bond had been duly executed and delivered,—that the plaintiff as custodian of the bond knew, or ought to have known, that it had not been executed, but failed to disclose the fact until long after the alleged liability had arisen, and after suit thereon at law had been brought.

The case was submitted to the Court on bill and answer, resulting in the decree as above stated, and the Aetna Company took this appeal. We can have no special difficulty about the right of an obligee to have a bond corrected in equity, even against a surety, when the principal has by mere oversight not executed it, after it is given to the principal by the surety to be executed and delivered to the obligee—provided, of course, the circumstances are such as would justify

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a Court of Equity in reforming an instrument of writing. If a surety executes such a bond, and gives it to the principal to be executed by him, and then to deliver it to the obligee, and the principal does so deliver it, having simply overlooked the fact that he had not executed it, and the obligee, believing it was properly executed and not observing that it had not been by the principal, placed it away for safe-keeping with its papers, all three parties believing it had been regularly executed and intending that it should be, it would be a confession of a very limited power to do justice, if a Court of Equity would have to admit that it could not require the bond to be put in the shape it was intended and believed to be by all the parties, merely because one of them was a surety. But we do not understand the powers of a Court of Equity to be so restricted. In *Newcomer v. Kline*, 11 G. & J. 457, the word "dollars" was omitted from a single bill, on which there was a surety, by mistake and accident as alleged in the bill, and our predecessors said: "No doubt can be entertained as to the jurisdiction of a Court of Equity to correct a mistake in this case, and that such relief will be granted even in the case of a surety. See 1 *John C. Rep.* 609." The Court passed a decree in the equity case requiring the money to be paid, and it also cited *Montville v. Haughton*, 7 Conn. 549, which seems to be one of the leading cases on the subject, and said: "In that case a bond was intended to be executed, but the seal was omitted by accident; relief was granted in equity, although it was contended that the party had his remedy at law. The Judge in delivering his opinion observing, that the plaintiffs were entitled to a bond, the consideration of which could not be enquired into at law. The remedy might not be adequate." In 24 *Am. and Eng. Ency of Law*, 656, it is said: "Equity may reform instruments against sureties as well as against principals"—citing a number of cases, which we will not repeat here, and on page 654 of that volume, it is said: "A written instrument may be corrected by supplying the omission of the name of a party, or inserting provisions which have been omitted."

We do not deem it necessary to consider the question, whether a surety can be sued at law on a bond, which the principal has not executed. We would regard it as at least extremely doubtful whether such suit should be permitted at law, on a bond such as this, as its form indicates so strongly that it was intended that the principal should sign it, as well as the surety. But as the object of this proceeding is to require the principal to execute it, it is difficult to see how that can affect the surety injuriously, beyond what was intended, if the original intention of the parties as to the execution of the bond be carried out.

But there is a difficulty, as this case is now presented, which we must consider. The case was submitted, as we have seen, on bill and answer. When one is so submitted, the plaintiff admits the truth of all matters stated in the answer, which are susceptible of proof by legitimate evidence. "The answer is to be taken as true in every particular, as well as to the matters alleged by way of avoidance as to those directly responsive to the bill. That is, the defendant is to be allowed the benefit of every fact advanced by him as a defense in his answer, as fully as if it had been put in issue by the plaintiff's general replication and the defendant had established it by proof." *Miller's Eq. Proc.*, pages 317 and 320, and cases cited, also *Read v. Reynolds*, 100 Md. 290. Of course, the plaintiff does not thereby admit a mere conclusion of law stated in an answer. As was said in *Barton v. Fraternal Alliance*, 85 Md. 14, where the bill alleged insolvency of the corporation, "if the facts admitted in the answer establish that allegation, a mere denial of the insolvency, being the statement of an erroneous conclusion of law, will not avail." All the averments of the answer, whether responsive to the allegations of the bill, or in avoidance of it, are to be taken as true, *Royston v. Horner*, 75 Md. 557. "From this it follows that if any averment of the bill is denied by the answer it cannot be considered. Further than this, if any material matter charged in the bill has been neither denied nor admitted by the answer, it stands for

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naught. The facts alleged in the bill and admitted by the answer, together with the whole of the answer susceptible of proof, are taken as true." *Miller's Eq. Proc.*, 320.

Now, keeping those principles in mind, how does this case stand? The appellee relies mainly on the seventh paragraph of the answer. After denying knowledge of the facts set forth in the thirteenth and fourteenth paragraphs of the bill, which describe how the appellee got the bond, etc., and denying that it made any representations for the purpose, or with the effect of inducing the plaintiff to believe that the bond was a perfect instrument, when it was received by the plaintiff, and averring that a casual inspection of it would have shown that it had not been executed by the principal. the answer proceeds: "And although this defendant may have signed and sealed the said instrument, and handed it to the said principal obligor for execution and delivery to the plaintiff, intending after such execution and delivery to be bound as surety thereon, it never consented to be bound otherwise, nor to final delivery of said bond prior to execution by the principal, and inasmuch as the said bond was never executed by the said principal obligor, the said bond is, and has always been, a mere nullity." It then denied that it was within the power of the officers of the Constructing Company to execute the said instrument, so as to fix liability on it for damages arising before the bond came into legal existence.

So, although that may be regarded as an admission of the execution of the bond by it, it alleges that it never consented to be bound until after it was executed by the Constructing Company, "nor to final delivery of said bond prior to execution by the principal." These allegations must be taken as proven at a hearing on bill and answer, but beyond that, by the answer the equity of the whole bill is either in effect denied, or neither denied nor admitted, excepting in so far as the above quotation admits the execution of the bond. For instance the answer alleges that the Aetna Company has no knowledge of the facts set forth in paragraphs 1 to 7 inclusive, of the bill, and therefore can neither admit nor

deny them, but calls for full proof of them. Some of them may not be very material, but the seventh alleges that the plaintiff in good faith received the instrument as the properly executed bond of the Constructing Company, with the Aetna Company as surety, as a performance of the agreement for it to give bond; that it was received without such scrutiny as to discover the fact that the Constructing Company had not executed it, and that considering it a good and binding obligation on the part of both, it was placed with its records for safekeeping. Those are material allegations, as one reason for a Court of Equity refusing reformation of an instrument is the negligence of the party seeking the release, "for equity does not interfere to relieve men of the consequences of their own carelessness." 24 *Am. & Eng. Ency. of Law*, 656; *Wood v. Patterson*, 4 Md. Chy. 335; *Kearney v. Sascor*, 37 Md. 264. Another important reason is laches, 24 *Ency. of Law*, 656. Still another is the denial, both by the Constructing Company and the Aetna Company of the plaintiff being compelled to pay for the completion of the work the sum of \$18,000 in excess of what it was to pay. The answer of the former alleges that there was no reason for it costing more than the price at which the Constructing Company agreed to do the work, and it alleges that the plaintiff owes it a large amount of money.

Of course we do not mean to say that such defenses can in point of fact be established by the evidence, but we have no means of knowing that they cannot be, and we must accept the facts alleged in the answer as proven. If, for example, it can be shown that the Constructing Company does not owe the plaintiff anything for which the Aetna Company would be liable, why should a Court of Equity correct the bond and then subject that company to a suit at law? But whatever the real facts may be shown to be, we are of the opinion that as the case is presented, by bill and answer, the plaintiff is not entitled to such a decree as that passed below. It is scarcely necessary to cite authority to show, that, although Courts of Equity have the power to reform instruments of

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writing, and make them conform to the intention of the parties, it can only be done on clear and satisfactory proof. It is true that that rule is generally applied to ascertaining what the contract to be reformed was intended by the parties to be, but the fact that there was a mistake lies at the very foundation of the right to relief. It certainly cannot be said that it is clearly and satisfactorily shown in this case that the plaintiff is entitled to relief, when we remember the effect of the answer.

We are also of the opinion, however, that justice to the parties requires not only that the decree be reversed, but, that the cause be remanded, so that further proceedings can be had. The plaintiff ought to file a replication, and take testimony to sustain such facts as may be necessary, to entitle it to have the bond corrected, if that can be shown. Indeed, it may be better to amend the bill, so far as necessary to have the whole matter disposed of in the equity case, if the Court concludes that the plaintiff is entitled to have the bond corrected. When a Court of Equity reforms an instrument, it can retain control and enforce it as reformed, administering full relief. *Md. Home Ins. Co. v. Kimmell*, 89 Md. 441; *Newcomer v. Kline*, 11 G. & J. 457; *Miller's Eq. Proc.*, 775; *Phoenix Ins. Co. v. Ryland*, 69 Md. 437.

Decree reversed, and cause remanded for further proceedings, the appellee to pay the costs in this Court, those in the lower Court to abide the result.

JOHN WILSON BROWN ET AL., TRUSTEES, vs. WILLIAM S. KEECH ET AL., ADMINISTRATORS OF LAURA J. KOFFMAN.

Apportionment of Annuities.

The general rule is that an annuity is not apportionable, and if the annuitant dies before the day fixed for payment, his personal representatives are not entitled to a proportionate part of the annuity for the time between the last day of payment and the day of his death.

Exceptions to this rule are made in the case of annuities given by a parent for the support of an infant child, or by a husband to his wife in lieu of dower, or for her support if living separate from him.

An annuity given by a testator to his son's wife in case she survives her husband is not apportionable.

The will by which a trust was created for the benefit of the testator's son provided that in case the wife of the *cestui que trust* survived him the trustees should pay to her the sum of \$6,000 a year during her life, said annuity to commence from the time of the death of the said son and to be paid quarterly. The annuitant died between two of the periods at which the annuity was made payable. *Held*, that this annuity is not apportionable and that the administrators of the widow are not entitled to receive from the trustees the proportion of the annuity from the time of the last quarterly payment to her to the day of her death.

Decided February, 2nd, 1910.

Appeal from Circuit Court No. 2 of Baltimore City (SHARP, J.).

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The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

Arthur Geo. Brown and *W. Irvine Cross*, for the appellants.

Z. Howard Isaac (with whom was *W. Gill Smith* on the brief), for the appellees.

THOMAS, J., delivered the opinion of the Court.

Article eight of the will of George Brown is as follows: "In case my son Alexander D. Brown, shall leave a wife surviving him at the time of his decease, then and in that event, I will, order and direct, that the trustees hereinbefore named in this my will, and their successors shall pay out of the interest, rents or net income, thereafter arising, from the two-fourteenths parts or shares of the aforesaid rest, residue and remainder of my estate and property, given in trust, for the use of my said son Alexander and his descendants, as particularly mentioned in the above article sixth of this, my will, to the wife or widow of my said son, so surviving him, as aforesaid, the sum of six thousand dollars a year, during her life, said annuity to commence from the time of the death of my said son, and to be paid quarter-yearly. And in case my daughter, Grace Ann, shall leave a husband surviving her, at the time of her decease, then, and in that event, I will, order and direct that the said trustees and their successors, shall pay out of the interest, rents or net income thereafter arising, from the two-fourteenths parts or shares of the aforesaid rest, residue and remainder of my estate and property, given in trust for the use of my said daughter Grace Ann and her descendants, as particularly mentioned in the aforesaid article sixth of my will, to the husband of my said daughter so surviving her as aforesaid, the sum of six thousand dollars a year, during his life; said last mentioned annuity, to commence from the time of the death of

my said daughter, and to be paid quarter-yearly. And in case my two grandchildren, Elizabeth Graham and George Brown Graham, shall both die before attaining the age of twenty-one years, and their father, William H. Graham, be then living, then, and in that event, I will, order and direct that the said trustees and their successors, shall pay out of the interest, rents or net income thereafter arising, from the two-fourteenths parts or shares of the aforesaid rest, residue and remainder of my estate and property, given in trust for the use of my said two grandchildren, Elizabeth and George B. Graham, as particularly mentioned in the aforesaid article sixth of my will, to the said William H. Graham, the father of the said Elizabeth and George B. Graham as aforesaid, the sum of six thousand dollars a year, during his life—said last mentioned annuity, to commence from the time of the death of the survivor of my said two grandchildren dying under the age of twenty-one years as aforesaid, and to be paid quarter-yearly.”

Alexander D. Brown died on the 19th of March, 1892. leaving a widow, Laura J. Brown, who in 1907, married Charles H. Koffman and died on the 17th of June, 1908. The annuity was paid to her by the trustees under George Brown's will and their successors up to the 19th of March, 1908, and this appeal is by the trustees from an order of the Circuit Court No. 2 of Baltimore City, passed on the petition of the administrators *pendente lite* of her estate, requiring them to pay to said administrators the sum of fourteen hundred and fifty dollars on account of said annuity from the 19th of March, 1908, to the time of her death on the 17th of June, 1908.

The appellants rely upon the well established rule that annuities are not apportionable, while the appellees contend, and the learned Court below held, that it is evident from the provisions of the will that the testator intended the annuity as a provision for the support and maintenance of his son's widow, and therefore intended it to be apportioned.

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The will, so far as it is set out in the record, does not direct that the annuity shall be apportioned, or state that it is for the support and maintenance of the annuitant, but counsel for the appellee base their contention on the fact that in the case of his son George, to whom the testator gave a portion of his estate absolutely, no provision, was made for his wife in case she survived him, while in the case of his son Alexander, whose share was left in trust for his use during life only, with remainders to his descendants, provision was made for his widow, as evidencing the intention of the testator to thereby provide for her support and maintenance and that the annuity should be apportioned.

Similar provisions were made for the surviving husband of the testator's daughter, and for the father of the testator's two grandchildren, in case they died before attaining the age of twenty-one years and he survived them, and if the fact that the testator did not give to his son Alexander any part of his estate absolutely indicates that he intended the annuity to his widow to be apportioned, it would follow that he also intended the other annuities to be apportioned, as he did not give to his daughter or to his grandchildren absolute estates in their shares; yet to hold these annuities apportionable, in the absence of some clearer evidence that the testator intended them to be apportioned, would extend the exceptions to the rule beyond the limit to which any well considered case has gone.

In the case of *Hay v. Palmer*, 2 P. Wms. 501, the annuity was expressly for the maintenance of the daughter of Sir Thomas Palmer until she became eighteen years of age or married, and the Master of the Rolls held that she was entitled to the annuity to the day she became of age, it being "for the daily support of the infant."

In the case of *Reynish v. Martin*, 3 Atk. 331, Elizabeth Philips by her will gave to her eldest daughter, Martha Philips, all her real estate in fee, "subject to such charges that shall be thereafter expressed," and then made the following provision for her daughter Mary; "and it is my will

that my said daughter Martha shall pay to my said daughter Mary the sum of 30£ yearly during Mary's continuing sole and unmarried, by fifteen pounds each May day, and All Saints day;" and the LORD CHANCELLOR said: "Although this annuity, or half-yearly payment, is not expressly given for maintenance of Mary as in the case of *Hay v. Palmer*, 2 Vern. 501, yet I am clear of opinion that it must be understood so, and therefore falls within the reason of that case." In the case of *Howell v. Hanforth*, 2 Wm. Black. 1016, the annuity was provided by a husband for his wife, and the Court said: "Though rents and common annuities are not apportionable either by law or equity, yet in equity the maintenance of infants is always apportioned up to the day of their deaths, etc., because it would be difficult for them to find credit for necessities, if the payment depended on their living to the end of the quarter. This case depends on similar principles, the annuity being for a separate maintenance of the *feme covert*; and, as it appears that the quarterly payments were not originally forward payments, by way of maintenance for the ensuing quarter (which might make a difference), but payable at the end of each quarter, in order to discharge the expenses incurred in the three preceding months, we think it ought to be apportioned."

In the case *Attorney-General v. Smythies*, 16 Beav. 385, "by letters patent of King James the First, a charitable corporation was created, having for its object the support and maintenance of a master and five poor persons. The master was to receive the income and pay the poor persons 2£. 12s. 0d, annually, by quarterly payments, for their support, relief and maintenance. Mr. Smythies, the master, died on the 24th of March, 1852; and a petition being presented by the new master for payment of the income, the executors of Mr. Smythies claimed an apportionment of the half year's income ending on the 5th July, 1852, upon a fund in Court belonging to the charity." The Master of the Rolls (Sir John Romilly) said: "I am of opinion that there must be an apportionment. The question does not rest upon the general

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ground of cases not falling within the provisions of the Apportionment Acts, but comes within the principle of the rule, in cases of infants and married women who have no other support. I think this must be so, from the language in the charter itself. Here is an eleemosynary establishment, the funds of which are directed by the statutes to be applied to the support, relief and maintenance of five poor persons; which upon proper construction of the letters patent, must be *de die in diem*, for if it were otherwise, the alms people might be unable to procure sufficient supplies for their support during portions of the year, in consequence of the risk which those who supplied them would run of not being repaid. For if they could not recover out of the fund what was owing for supplies, they would be deprived of payment altogether. The same principle, I think, applies to the master as to the five poor persons, and therefore there must be an apportionment of the dividends between the present and the representatives of the late master." Mr. Swanston. in an extensive note to *Ex Parte Smyth*, 1 Swanst. R. 338, after stating the rule that rents and annuities are not apportionable, says: "A remarkable exception to the general rule has been introduced in the instance of annuities for the maintenance of infants (*Hay v. Palmer*, 2 P. W. 501; *Reynish v. Martin*, 1746 MS.; *Sheppard v. Wilson*, 4 Here, R. 395), or of married women living separate from their husbands (*Howell v. Hanforth*, 2 Bl. 1016; 2 *Scholes & Lefr.*, 303); an exception supported by the necessity of the case, and the consequent presumption of intention (2 Bl. 1017; 2 P. W. 503), and therefore not extended to an annuity for the separate use of a married woman, living with her husband and maintained by him."

In the case of *Smith v. Wistar*, 5 Phil. R. 145, the testator devised certain ground rents, payable half-yearly, to his wife for life, with remainder over to his sisters and their children, and the Court said: "In *Green v. Osborn*, the gift of an annuity to a widow in lieu of dower was held to entitle her representative to an apportionment of payments which

had not fallen due, and which, in strict law, could never become so. The equity here is quite as strong as it was there, because the Act of April, 1833, makes every devise to a widow, accepted by her, a devise in lieu of dower. Bequests of money payable periodically, are said, in *Earp's will, Parsons' Equity Cases*, 453, 468, to be apportionable when given for maintenance or to someone whom it is the duty of the testator to provide or maintain. It seems to be conceded that a gift to a child is within this exception, and the rule should be the same in the case of a widow. Both may be presumed to stand equally near the affections of the testator, and the position of the widow is obviously preferable when she has accepted the legacy in lieu or bar of her dower, and claims as purchaser, and not merely as volunteer." In the case of *Blight v. Blight*, 51 Pa. St. 425, the annuity was payable quarterly, in lieu of dower, and the Court held that: "The annuity was in lieu of dower, and lasted as long as dower would have lasted, and dower runs to the last day of life."

In *Lackawana Iron & Coal Company's Case*, 37 N. J. Eq. 26, John Stinson and wife conveyed his farm to Nelson Vliet, the husband of their granddaughter, in consideration of an agreement on the part of the grantee (the performance of which was secured by his bond and mortgage of the property), to pay Stinson \$250 yearly, on the 1st April, during the lifetime of Stinson, and if Stinson's wife should survive him, to pay, or cause to be paid to her, yearly the sum of \$200 during the term of her natural life. Mrs. Stinson survived her husband, and died on September 19th, 1881. The annuity was paid up to April 1st of that year and her personal representatives claimed a proportionate part of the annuity to the day of her death. The Chancellor said: "There is no doubt that the general rule is that when an annuity is payable on a fixed day during life, and the annuitant dies before the day, his representative is not entitled to a proportionate part of the annuity for the time which has elapsed since the last day of payment. * * * But the rule as

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to annuities has established exceptions in the case where an annuity is given for the maintenance of a wife living separate from her husband, or for the support of minor children. And the exception has been extended to the apportionment of the income of a fund belonging to a charitable corporation having for its object the support of poor persons. And also where the annuity has been given in lieu of dower. * * * The conveyance in consideration of which the agreement to pay the annuity was made, was evidently a family arrangement, and the only consideration of the conveyance of the farm to Mr. Vliet was the agreement to pay the annuities. It would seem, too, that the object of Stinson in making the arrangement, was to secure the payment of the annuity to him for life, and to his wife in case she should survive, for their support. She joined in the conveyance to bar her dower, and part of the consideration of her release was the agreement to pay the annuity to her for her life, in case she should outlive her husband. The principle of the cases which constitute the exceptions to the general rule, is applicable here."

In the case of *Parker v. Seeley*, 56 N. J. Eq. 110, the annuity was declared by the testator to be in lieu of dower, and the Court held that the widow was entitled to it to the time of her death. In *In re Cushing's Will*, 58 Vt. 393, the testator bequeathed to his wife, "the whole interest and income of six thousand dollars to be paid to her each and every year during her life; the first payment to be made at the close of one year after my decease, and so on annually thereafter as long as she shall live. And if said interest or income shall at any time prove insufficient to support her in a manner becoming her station and condition in life, and in such manner as shall make her comfortable, and meet all necessary expenses of a reasonable prudent course of life, then it is my will that so much of the said six thousand dollars shall be taken as shall be necessary to effect the object aforesaid." The Court held that she was entitled to the interest on the six thousand dollars to the time of her death, and said, treating this as an annuity, the proposition is sound that "annui-

ties are not in their nature apportionable either in law or in equity" (2 *Williams' Ex'rs.*, 835); but there are exceptions to the rule, and the same author says: "With respect to interest, interest, being *due die in diem*, is not one entire thing, but an aggregate of many distinct things, 'and may be apportioned.' The language last quoted was evidently borrowed from the note to *Clunn's Case*, reported in 10 Coke, 128a. The note is by Fraser, wherein he says, after the remark adopted by Williams: 'it is obvious, therefore, that the representatives of a party dying before the day at which interest was usually payable would be entitled to interest up to the time of the party's death.' * * * In *Perry, Trusts*, par. 556, the author says: 'But where an annuity is given to a widow in lieu of dower, or for maintenance of an infant, or for the separate maintenance of a married woman, an apportionment is made on the ground that such annuity is necessary for support till the death of the annuitant;' and he says further: 'But interest money upon notes, mortgages, and similar securities accrues from day to day, although it is not payable until a fixed day, it is therefore apportionable, and trustees must pay the proportion accruing during the life of the tenant for life to his representatives.'"

These cases fairly illustrate the utmost limit to which the English and American decisions have gone in establishing the well defined exceptions to the general rule, while the Courts of other states have adhered more closely to the common law rule.

In 2 *Perry on Trusts*, sec. 556 (5th ed.), the author says: "At common law rent could not be apportioned; and if a tenant for life died near the end of a quarter, his representative could receive no part of the rent for the term." And after stating that the statutes in many of the States have made rent apportionable says: "But an annuity to a tenant for life is not apportionable, and if the tenant dies within three days of the day of payment, his representatives are not entitled to any proportion of the annuity. But where an annuity is given to a widow in lieu of dower, or for maintenance of an

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infant, or for the separate maintenance of a married woman, an apportionment is made on the ground that such annuity is necessary for support till the death of the annuitant." The rule and the exceptions to it are stated in 2 *Cyc.* 468, as follows: "It was the uniform and unbending rule of the common law, recognized both by Courts of law and equity, that annuities, whether created *inter vivos* or by will, were not apportionable in respect of time."

"The rigor of the common law rule has been to some extent ameliorated in modern times by the recognition of certain well defined exceptions, as in cases where an annuity is given in lieu of dower, or for the separate maintenance of married women, or for the support of children, or where it consists of interest, or of other sums accruing, and therefore payable, *de die in diem*." See also 1 *Am. & Eng. Ency. of Law*, 595; 1 *Story's Equity*, secs. 479, 480; 2 *Wms. on Ex.*, 49 note.

In the case of *Heizer v. Heizer*, 71 Ind. 526, a son agreed in writing, for a valuable consideration, to pay his father \$100 annually on the 6th day of October, for his *maintenance and support* during his life, and the Court held that the annuity was not apportionable. In the case of *Wiggin, Administrator, v. Sweet*, 6 Metc. 194, a testator, among other bequests to his wife, gave her an annuity of \$800, during the full term of her life, to be paid to her quarter-yearly, and payments were accordingly made to her for several years, and she died three days before the expiration of a quarter, and SHAW, C. J., said: "The general rule, both of law and equity is, and is admitted by the appellee's counsel to be, that where an annuity is payable on fixed days during life, and the annuitant dies before the day, the personal representative is not entitled to a proportionate part of the annuity. The same rule prevails in regard to rents and other payments on particular days. * * * As Mrs. Sweet died August 22d, 1840, that portion of the annuity which is supposed to have accrued from May 25th to August 22d, and which would have been payable, had she lived till the 25th of August, cannot be allowed. It falls within the general rule al-

ready stated, and not within the exceptions to that rule which were made in the cases cited by the appellee." In the case of *Dexter v. Phillips*, 121 Mass. 180, GRAY, C. J., said: "It is a general rule of the common law, followed in chancery, that sums of money, payable periodically at fixed times, are not apportionable during the intervening periods. It is accordingly well settled, both at law and in equity except when otherwise provided by statute, that a contract for the payment of rent at the end of each quarter or month is not apportionable in respect to time. * * * Thus annuities, except where clearly intended for the daily support of the beneficiary, as in the case of a child or of the separate maintenance of a wife, are within the rule." In the case of *Kearney v. Cruikshank*, 117 N. Y. 95, the testator directed his executors, "out of the residue and remainder of said net income of my estate to pay to Sarah Louisa Reed, wife of David L. Reed, of the City of New York, it being my intention as a daughter to adopt her, the sum of two thousand dollars a year during her natural life, on her sole and separate receipt, as if she were a *feme sole*, free from the control, interference, or debts of her present or any future husband," and the Court said: "We are not at liberty to decide the question in this case upon our notions of natural equity or justice, provided the settled rule of law fixes the rights of the respective parties and determines the question presented. At common law, annuities were not apportionable, subject however, to two exceptions, viz, where given by a parent to an infant child (*Hay v. Palmer*, 2 P. Wms. 501; *Reynish v. Martin*, 3 Atk. 330), or by husband to his wife living separate and apart from him (*Howell v. Hanforth*, 2 W. Bl. 1016). These exceptions were founded on reasons of necessity, and the presumption that such annuities are intended for maintenance, and are given in view of the legal obligation of a parent to support his infant children, and of a husband to maintain the wife. But with these exceptions it was the uniform and unbending rule of the common law, recognized both by Courts of law and equity, that annuities, whether created *inter vivos* or by

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will, were not apportionable in respect of time." In the case of *Henry v. Richardson*, 81 Miss. 743, Mrs. L. H. Henry by her will provided for the payment of annuity to Mrs. D. W. Henry during the life of the husband of the testatrix, and CHIEF JUDGE WHITFIELD, after a very careful review of all the authorities, held that the annuity was not apportionable. In the case of *Moyer v. Sanford*, decided in 1904, and reported in 63 L. R. A. 625, the Supreme Court of Connecticut held that an annuity is not apportionable, even when given to a widow in lieu of dower.

As we have seen, the same general rule applies to both rents and annuities, and in the case of *Martin v. Martin*, 7 Md. 368, JUDGE TUCK said: "The principles of apportionment, particularly as applicable to rent, are disoussed, and the authorities collected, in the notes to *Smyth's Case*, 1 Swanst. 337. We consider the rule established, that, with the exception of cases arising under the statute of *George*, rent cannot be apportioned as to time, and that the person entitled to the estate when the rent falls due, must have the entire amount payable at the time." The rule as applied to rents, was again recognized and enforced in the case of *Getzandaffer v. Caylor*, 38 Md. 280.

It would seem apparent from the authorities cited, that the annuity in the case at bar cannot be regarded as coming within any of the well defined exceptions to the common law rule. It was not expressly given for support and maintenance; it is not a provision by a husband for the separate maintenance of his wife, or for his widow, in lieu of dower, or by a parent for the maintenance of his child, but a gift by one who was under no obligation to provide for the support of the annuitant. He may have been induced to make her the recipient of his bounty by the fact that he did not give her husband any part of his estate absolutely, but we have no reason to suppose that he intended to do more than the plain language of his will indicates. The testator left a large and valuable estate, and his will, which was said in *Graham v. Whitridge*, 99 Md. 269, to be very voluminous, covering over twenty-one

pages of the printed record in that case, was carefully prepared. We must assume that he was familiar with a rule so uniformly recognized in England and in America, prior to the enactment of statutes changing the common law rule, and that if he had intended the annuities given by the eighth article of his will to be apportioned, he would have so directed with the clearness that characterizes the provisions of his will. It is far safer to adhere to settled rules of construction, than to venture upon a strained intepretation of provisions that, in the light of the rule, are wholly free from uncertainty or ambiguity. It may require Courts, at times, as in the case of *Kearney v. Cruikshank*, *supra*, to surrender their notions of natural equity, but it will tend to secure greater certainty in the administration of justice, and avoid the risk of giving to instruments an effect not contemplated by the makers.

Being unable to concur in the conclusion reached by the learned Court below, we must reverse the order appealed from.

Order reversed and petition dismissed, the costs in this Court and in the Court below to be paid by the appellees.

BRISCOE and BURKE, JJ., dissent.

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Syllabus.

BALTIMORE SKATE MANUFACTURING COMPANY *vs.* WILLIAM D. RANDALL, JR.

*Receivers—When Not to be Appointed Without Notice—
Appeal.*

A bill filed by a creditor of a corporation alleged that it was insolvent; that its property was in danger of distraint for non-payment of rent; that suits at law and attachments were threatened against it, and asked for the appointment of a receiver. No proof was offered in support of the averments of the bill and no evidences of debt were filed to show that the plaintiff was a creditor of the company. *Held*, that upon this bill a receiver should not be appointed without notice to the corporation and without a hearing, since it is not made to appear that there is imminent danger of loss and injury unless immediate possession of the property be taken by the Court.

Upon appeal from an order appointing a receiver upon a bill alone, orders subsequently passed in the cause are not before this Court for review.

Decided February 2nd, 1910.

Appeal from the Circuit Court of Baltimore City (HEUISLER, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

W. Stuart Symington, Jr., and *Henry H. Dinneen*, for the appellant.

Addison E. Mullikin (with whom was *Joseph C. France* on the brief), for the appellee.

BRISCOE, J., delivered the opinion of the Court.

This appeal was heard on the 2nd day of December, 1909. A *per curiam* opinion was filed for reasons stated therein on the 9th of December, 1909, announcing our decision, "that the order filed September 2nd, 1909, appointing a receiver be and is hereby reversed and the cause remanded." We will now state the reasons for that conclusion.

The defendant, the Baltimore Skate Manufacturing Company and the appellant on this record, is a corporation duly organized under the laws of the State of Delaware, and was at the institution of these proceedings engaged in the manufacture of patented Roller Skates, at No. 6 West Lombard street, Baltimore City. The capital stock of the company is alleged to consist of fifteen hundred shares of the par value of one hundred dollars each. One thousand shares of the stock is common stock and the remaining five hundred shares is seven per cent. cumulative preferred stock. All of the common stock was issued and paid in, and two hundred and eighty-two shares of the preferred stock were issued and paid for in full.

The plaintiff, the appellee here, is an alleged creditor of the company to the extent of seven thousand dollars secured by promissory notes for money loaned, which notes are now due and unpaid. In addition to this, he asserts a liability for the payment on his part as endorser of certain of its promissory notes and accounts payable.

The bill was filed on the 2nd day of September, 1909, by the plaintiff against the defendant, in the Circuit Court of Baltimore City, alleging the insolvency of the defendant, and asking the appointment of a receiver to take charge of the property and effects of the corporation.

The substantial averments of the bill and those upon which he relies for the relief sought, are, that the corporation is hopelessly insolvent, that its debts are accumulating, its machinery and assets are in danger of distraint and there are threatened suits at law and by attachments, and its property

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and assets are in imminent danger from these and like proceedings.

By the eighth paragraph of the bill it is alleged: "That the property and assets of the defendant corporation are in imminent danger of being attached under the laws of the State of Maryland, permitting a resident creditor to attach the goods and property of a non-resident debtor on an original process, and is in the further danger of being seized by the landlord for the non-payment of rent, and that said proceedings would further confuse its affairs and considerably lessen the chances of collection by your orator and other creditors of the amounts due them or any part thereof."

The prayer of the bill is that a receiver may be appointed to take charge of all the defendant corporation's business, books, papers and accounts, franchises, goods and effects, and to collect the debts due thereto, and to preserve or dispose of the same under the direction of this Court.

On the 2nd day of September, 1909, on the same day the bill was filed, and without notice to the defendant corporation, the Circuit Court of Baltimore City upon the bill and affidavit, passed the following order.

"Upon the foregoing bill of complaint and affidavit, it is this 2nd day of September, 1909, by the Circuit Court of Baltimore City ordered, adjudged and decreed, that Addison E. Mulikin, Esq., be and he is hereby appointed receiver of this Court of all and singular, the property, franchises, effects, credits and affairs of any and every kind, of the defendant corporation, the Baltimore Skate Manufacturing Company; that the said receiver be authorized and directed to take immediate possession of all and singular the property and premises of the defendant corporation, as above described, whereof he is hereby appointed receiver, to have and to hold the same as the officer of and under the order and direction of this Court;

"It is further ordered, that the said receiver, before entering upon his duty, shall execute proper bond, with surety or sureties to be approved by this Court or the Clerk thereof, and to file the same with the Clerk hereof, in the sum of twelve thousand dollars;

"And it is further ordered that the said receiver report to this Court as soon as possible the condition of the property coming into his hands and to make such recommendations as to the management thereof as may to him seem wise, to be hereafter passed upon by this Court."

And from the order, passed on the 2nd day of September, 1909, appointing the receiver, the defendant, on the 10th day of September, 1909, entered an appeal.

There were other proceedings subsequent to the order appealed from, to wit, the defendant's answer to the bill, exhibits filed by the defendant, amendment to the original bill of complaint, also a *nunc pro tunc* order dated the 27th of October, 1909, refusing to rescind the order appointing the receiver, but as we are restricted on this appeal to the propriety of the order passed on the 2nd day of September, 1909, in the determination of the case, they will not be considered by us. *Wagner v. Cohen*, 6 Gill, 97; *Haight v. Burr*. 19 Md. 130; *Blondheim v. Moore*, 11 Md. 365.

The sole question for our consideration is whether the prayer for the appointment of a receiver in this case should have been granted upon the averments of the bill in so summary a manner, and without a hearing upon the part of the defendant.

In *Davis v. U. S. Electric Co.*, 77 Md. 40, it is said: The principles applicable to the appointment of receivers have been definitely settled in Maryland. The power is a discretionary one, to be exercised with great circumspection and only in cases where there is fraud or spoliation or imminent danger of the loss of the property if the immediate possession should not be taken by the Court, and these facts must be clearly proved. *Frostburg Bldg. Association v. State*, 47 Md. 338; *Blondheim v. Moore*, 11 Md. 365.

In this case, there was no proof offered in support of the averments of the bill and no evidences of debt were filed to show that the plaintiff was a creditor of the company. Nor was any satisfactory reason assigned for their non-production. There was no charge of fraud or mismanagement nor proof

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of a single material or vital averment, that would justify the appointment of a receiver without notice to the defendant and without a hearing of the case on its merits. *Banks v. Busey*, 34 Md. 437; *Mahaney v. Lazier*, 16 Md. 69; *Morton v. Grafflin*, 68 Md. 554; *Shoemaker v. Mechanics Bk.*, 31 Md. 396.

As was said by this Court, in *Triebert v. Burgess*, 11 Md. 452, there is no such imperious necessity as should justify the appointment of a receiver without notice, in the case before us, especially as the defendants were merchants residing in the City of Baltimore but a short distance from the Court in which the order was passed. *Nusbaum v. Stein*, 12 Md. 315; *Gottschalk v. Stein*, 69 Md. 51.

It is well settled by all the adjudications of this Court, and by the established equity practice in this State, that Courts cannot be too cautious and careful, in the exercise of a jurisdiction so summary in its character, and one which may deprive a person of his property without notice and without a hearing. To uphold an *ex parte* proceeding of this character, would not only afford a convenient mode of depriving one of his property but would work an injury that would be difficult to subsequently repair or remedy.

It follows from what has been said, that the bill in this case was fatally defective, and also for lack of notice to the defendant, and the Court below committed an error in passing the *ex parte* order of the 2nd day of September, 1909, and this order was properly reversed.

As to the *nunc pro tunc* order passed on the 27th day of October, 1909, and brought before this Court by a writ of diminution, we need only say, that this order was passed subsequent to the order appealed from, and is not properly before us on this appeal. *Wagner v. Cohen*, 6 Gill, 78; *Alexander v. Worthington*, 5 Md. 471.

The appeal in this case is from the order passed on the 2nd day of September appointing the receiver, and this brings before us for review only the proceedings upon which it was based, and the questions materially connected there-

with. Subsequent orders or proceedings not before the Court when it passed the order appealed from, cannot be considered, because to do so, would practically be an exercise of original jurisdiction. We are to be confined to the case as made out by the bill, because upon the bill and affidavit alone, the order was passed. *Wagner v. Cohen*, 6 Gill, 78; *Hull v. Caughy*, 66 Md. 104; *Alexander v. Worthington*, 5 Md. 471; *Blackburn v. Crawford*, 22 Md. 447; *Brick Co. v. Robinson*, 55 Md. 410; *Johnson v. Thomas*, 6 Md. 452; *Goodburn v. Stevens*, 5 Gill, 1.

For the reasons assigned, we reversed the order passed September 2nd, 1909, and remanded the cause, the appellee to pay the costs.

Order reversed, and cause remanded with costs.

J. EDWARD WEBSTER ET AL. vs. SUSQUEHANNA POLE LINE COMPANY.

Eminent Domain—Existence of Right to Condemn May be Determined on Bill for Injunction, but Not the Necessity of Taking Certain Property—Supplying of Electric Power to All Persons a Public Use—Some Purposes of Corporation Public and Some Private—Condemnation of Fee in Part of Land and of Easement in Another Part—What Amendment of Charter of Public Service Corporation May be Made.

The question whether a corporation, seeking to condemn property for its use under an injunction, is legally vested with the power of eminent domain may be raised under a bill for an injunction to restrain the condemnation proceedings.

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The supplying of electric power or energy to the public generally, on equal terms, is a public use, and a corporation which supplies such power may be vested with the right of eminent domain to condemn land for its line of poles and wires.

The charter of a Pole Company declared that it was formed to act as a common carrier of electric power or energy, and the right was given to the public, whether individuals or corporations, to demand of the company without partiality all connections and facilities, upon complying with reasonable regulations and rates. *Held*, that the uses declared in the charter are public uses; that the company is bound to supply electricity at reasonable rates and without discrimination to all persons desiring it to the extent of its capacity; that the company is subject to public regulation and control, and that it is authorized, under Code, Art. 23, sec. 366, to acquire by condemnation any property necessary for its purposes, either in fee simple or for a less estate.

The fact that some of the purposes for which a corporation is chartered are public and some are private, does not operate to prevent it from acquiring property by condemnation for its public uses, unless those uses are so combined with the private purposes that the two cannot be separated.

The question whether the taking of certain land is necessary for the public purposes of a corporation is one to be determined by the Court to which the inquisition is returned. It is not to be decided upon a bill for an injunction to restrain condemnation proceedings.

A Pole Company chartered to supply the public with electric power and authorized by law to condemn property either in fee simple or the use thereof in fee simple or for a less estate is entitled to condemn certain land of a party in fee simple for its necessary purposes, and also an easement upon other land of the party to cut, trim and remove trees and other obstructions therefrom.

A corporation which has condemned land for a public use in pursuance of its charter cannot afterwards, by an amendment of the charter, divest itself of the public use and then hold

the land for private purposes, since a public service corporation can be compelled by a mandamus to perform its public duties, and no such amendment of its charter could lawfully be made.

Decided February 2nd, 1910.

Appeal from the Circuit Court for Harford County (VAN BIBBER, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

Wm. H. Harlan, for the appellants.

Fred. R. Williams and Francis T. Homer (with whom were *George R. Willis* and *Stevenson A. Williams* on the brief), for the appellee.

PEARCE, J., delivered the opinion of the Court.

This is an appeal from an order of the Circuit Court for Harford County, as a Court of Equity, refusing to grant a preliminary injunction restraining proceedings by the defendants to condemn certain lands belonging to the plaintiffs, and dismissing the plaintiffs' bill. The appeal is brought under sec. 31 of Art. 5 of the Code authorizing an appeal at such a stage of the case, as held in *C. & P. Telephone Co. v. Baltimore City*, 89 Md. 689.

The principal defendant is a corporation, as appears from the copy of its charter filed with the bill as an exhibit, under the name of the Susquehanna Pole Line Company of Harford County, formed on August 13th, 1907, under sec. 28, class 13 of Article 23 of the Code of Public General Laws of Maryland. Its charter recites that it is formed "for construction, owning or operating telegraph or telephone lines in this State, and for the transaction of any business in which

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electricity, either over or through wires may be applied to any useful purpose, and especially to buy, sell, operate or lease pole lines, erect poles, string wires thereon, or on poles of other individuals or corporations on any and all streets, avenues, highways and roads, public or private, and over and under all canals and other waterways, and across any and all bridges, and to use the same either for the transmission of electric current for delivery to customers on such lines, or for transmission of current to independent vendors thereof, and for the transmission of current for any individuals or corporations producing or delivering the same to said corporations, and to sell or lease to either individuals or corporations the right to string electric wires on, or attach electric wires to, any or all poles so erected, owned or leased and to use such lines both as through lines and for local delivery, and to sell or lease wires, cables or fixtures for the transmission and use of electric current in any manner or form whatsoever, and to manufacture and deal in any and all apparatus and things required for, or capable of being used in connection with, the transmission, delivery, and accumulation, and other employment of electric energy and current, or of electricity; to build and construct and use for any of the purposes stated above, underground subways or conduits, either under or across any streets, avenues, highways, roads, canals and waterways, and to string electric wires, cables or conductors therein, and to buy or lease from or sell or let to any other individual or corporation, the right to string and use as aforesaid electric wires, cables or conductors in such subways; to erect, operate, maintain and either lease or let the sub-stations for raising or lowering the voltage of any electricity received for it for distribution over its lines, and for the accumulation, storage, transmission and distribution of electric current, and to purchase, lease, hire, buy, sell or deal in any and all machinery used therein or in connection therewith, or convenient to its economical and practical operation; * * * and to have the powers provided by section 366 of Art. 23 of the Code of Public General Laws of 1904, together with such

other rights, powers and privileges, as are by the general laws granted to all corporations formed under the general incorporation Acts of the State of Maryland, and granted by any laws that may be particularly applicable to corporations formed under the class aforesaid."

In November, 1909, the defendant corporation amended its charter in the manner allowed and prescribed by law, by inserting after the clause which ends with the words "convenient to its economical and practical operation," the following clauses:

"To act as a common carrier of electrical power or energy by means of all appropriate or necessary structures, appliances, machinery, fixtures, devices, inventions or processes now or hereafter capable of being used in the transaction of any business wherein electricity or electric power or energy may at any time or place or in any manner be applied to any useful purpose.

"And the public in like situation with said Susquehanna Pole Line Company of Harford County, its successors and assigns, whether individuals, partnerships or corporations, are hereby vested with and entitled to a right to apply for and demand of the said Susquehanna Pole Line Company of Harford County, its successors and assigns, all connections and facilities without discrimination or partiality, to the extent of the just and reasonable distribution, transforming, carrying and connecting capacity and facilities of the said the Susquehanna Pole Line Company of Harford County, its successors and assigns, provided such applicant comply or offer to comply with all reasonable rules, regulations, terms and rates of said the Susquehanna Pole Line Company of Harford County its successors and assigns, and the said the Susquehanna Pole Line Company of Harford County, its successors and assigns, shall and must supply all applicants as aforesaid in like situation as aforesaid, who may exercise their said right, with such connection and facilities as aforesaid and to the extent and upon the condition aforesaid and the said the Susquehanna Pole Line Company of Harford

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County, its successors and assigns, shall not impose any conditions or restrictions upon any such applicant that are not imposed impartially upon all persons, corporations or partnerships in like situation with it; and further the said Susquehanna Pole Line Company of Harford County shall not discriminate against any such applicant engaged in any lawful business or between any such applicants engaged in the same business by requiring as a condition, for furnishing such facilities aforesaid, that said facilities shall not be used in the business of said applicant or otherwise for any lawful purpose."

After alleging the foregoing, the bill further alleged that, "the particular business in which electricity over or through wires may be employed to any useful purpose which said defendant company purports to be transacting is the "transmission of electric power, energy or commerce, from the power house of the McCall Ferry Power Company a corporation incorporated under the laws of the Commonwealth of Pennsylvania, and which is constructing a hydro-electric plant for the generation of electric power or energy on the Susquehanna river at McCall's Ferry, in York and Lancaster Counties in said Commonwealth, to points of delivery to consumers within the State of Maryland.

"And the said defendant company purports to have contracted with said McCall's Ferry Power Company for the transmission of such electric power or energy so to be generated as aforesaid from the power house of said company to points in Pennsylvania and Maryland for delivery to consumers.

"And said defendant company is claiming that therefore it is engaged in interstate commerce between said States."

And also alleged that on November 23, 1909, the defendant corporation professing to act under and in virtue of the aforesaid powers, and of those claimed to be conferred by Chapter 240 of 1908 amending and re-enacting section 366 of Article 23, took proceedings under sections 251, 252 of Art 23 relating to condemnation by railroad corporations, for

the condemnation of certain lands of the plaintiffs *in fee simple*, as authorized by Chapter 240 of 1908, together with an easement to cut, trim and remove all trees and other obstructions (upon other lands of the plaintiffs) which might interfere with or fall upon the land sought to be condemned in fee, but that said powers were absolutely *void ab initio* and the jury were without jurisdiction to find and return any inquisition in the premises.

1st. Because the proceedings are in conflict with Article 3, section 40 of the Constitution of Maryland which forbids the taking of private property for any other than a public use, and are also in conflict with the fifth amendment to the Constitution of the U. S. which declares that no person shall be deprived of life, liberty, or property without due process of law.

2nd. Because Article 23 of the Declaration of Rights of Maryland provides that no man ought to be disseized of his freehold liberties or privileges but by the law of the land; and 3rd, because the fourteenth amendment to the Constitution of the U. S. provides that no State shall deprive any person of life, liberty or property, without due process of law.

The bill prayed for a preliminary injunction against the said corporation and also against James A. Lyle, the justice of the peace who issued the warrant to summon the jury of inquisition, and Joseph E. Spencer, the sheriff of Harford County, to restrain them from any further proceeding pending a hearing of this case.

As both the appellant and the defendant corporation have in their briefs, stated certain facts almost in the same language, explanatory of the allusion of the bill to the McCall's Ferry Power Company, we shall abstract those statements from the brief of the appellee in order to exhibit more clearly than the record does, the relation of the appellee to that company.

"The appellee, together with a local corporation in York County, Pennsylvania, and in Baltimore County, Mary-

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land, has been engaged in purchasing lands or options in each of said counties for the purpose of constructing thereon, a continuous transmission or distribution line or lines of electric energy from a point on the Susquehanna river in York County, at McCalls Ferry about ten miles above Mason and Dixon's Line, through the counties of York, Harford and Baltimore, to Baltimore City and elsewhere in this State.

"At McCalls Ferry, the McCalls Ferry Power Company, a corporation of the Commonwealth of Pennsylvania, has nearly completed the construction of its dam across said river, and its hydro-electric generating plant, whereby it proposes to generate about 100,000 H. P. of electric energy, for sale and distribution to the public and consumers generally. The appellee and the local corporations aforesaid have contracted with said McCall Company, for the transmission of electric current about to be generated as aforesaid, to points of delivery in Pennsylvania and Maryland."

From this statement it is apparent that the appellee is a subsidiary corporation of the McCalls Ferry Power Company.

As the jurisdiction of the Court to entertain this bill is challenged by the appellee that question will be considered at once. We have seen that the bill charges that the powers under which the defendant claims to be acting are absolutely void *ab initio*, and that the said sheriff and jury are without jurisdiction to find and return any inquisition whatever, and this case comes up on appeal under Code, Article 5, section 31 upon the plaintiff's bill and exhibits, without answer, upon the order refusing the preliminary injunction. In *Western Md. R. R. v. Patterson*, 37 Md. 139, the true distinction in respect of jurisdiction by injunction in such cases, is stated to be "between the cases where the proceedings are void for want of authority, and where they are irregular and defective because of some omission or neglect which may be cured *pendente lite*, or taken advantage of whilst in *fieri*," and it was there held "that in the former cases a Court of Equity had jurisdiction but in the latter it had none." In that case the

railroad company sought to condemn a fee simple and Patterson claimed the only power was to condemn an easement and the bill sought to arrest and restrain the proceedings before confirmation. The lower Court granted the injunction, but was reversed on appeal because, as the Court said: "There is no necessity for an injunction, where the Courts peculiarly vested with authority over the subject are competent to relieve and it is a sufficient ground for refusing it that the complainant has an ample remedy at law." In other words, that the *extent* to which the power of condemnation had been granted, and could be validly exercised by the railroad company, was a matter for the Court vested with the power of ratifying an inquisition taken under a power to exercise the right of eminent domain. In *Baltimore and Havre de Grace Turnpike Co. v. Union R. R. Co.*, 35 Md. 231, the latter corporation sought to condemn two crossings of the turnpike—one for the main branch of its railroad and one for a lateral road it proposed to build. The bill charged that the award of damages for both crossings was grossly inadequate and that the crossings would irreparably injure the plaintiff's franchises, and that the second crossing was *ultra vires*. The lower Court refused the injunction as to both crossings, but on appeal, this Court held that while the charter gave the power to condemn an easement for the main line, it gave no power to build a lateral line, and it therefore affirmed the decree as respected the main line crossing, but reversed it as to the crossing of the proposed lateral line, holding that the injunction should have issued as to that.

In *Page v. Mayor and City Council*, 34 Md. 565, JUDGE GRASON said: "There is no doubt that where an ordinance is void, and its provisions are about to be enforced, any party whose interests are to be injuriously affected thereby, may, and properly ought to go into a Court of Equity and have the execution of the ordinance stayed by injunction."

Against these authorities, the appellee cites *Turnpike Co. v. N. C. R. R. Co.*, 15 Md. 198, as holding that want of power was a cause to be assigned against confirmation; but

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JUDGE TUCK's language in that case shows clearly that it is not susceptible of that construction. What he said was, "no better cause could be assigned against the confirmation, than want of power to condemn the *particular property* proposed to be taken," thus distinguishing between the attempted exercise of a void power, and the application of a valid power to property not within the scope of the power. That we have here placed the proper construction upon the language of JUDGE TUCK, will appear from what was said in *C. & P. R. R. Co. & B. & O. R. R. v. Pa. R. R. Co.*, 57 Md. 275, where the Court refers to that case "as showing that the question of the power to condemn the *particular property* in controversy was exclusively a question for the confirming tribunal." In *Mayor & City Council v. Gill*, 31 Md. 359, JUDGE BARTOL said: "In this State the Courts have always maintained with jealous vigilance the restraints and limitations imposed by law upon the exercise of power by municipal and other corporations; and have not hesitated to exercise their rightful jurisdiction for the purpose of restraining them within the limits of their lawful authority, and of protecting the citizen from the consequence of their unauthorized or illegal acts."

We cannot therefore dismiss this bill for want of jurisdiction in the Circuit Court for Harford County.

The next and principal question in the case is, whether the taking of the appellant's property under the authority of section 366 of Article 23 of the Code as amended by Chapter 240 of the Acts of 1908, and under the provisions of the Charter of the appellee as hereinbefore set out, is a taking for a public use within the definition of that term adopted by this Court in the recent case of *Arnsperger v. Crawford*, 101 Md. 247, upon which case the appellants seem largely to rely in support of their contention that the proposed use is not a public use.

Section 366 of Article 23 gives to any corporation formed, as the appellee is, under class 13, section 28 of Article 23, the power "to acquire by condemnation any property right

whatsoever necessary for its purposes in its discretion, either in fee simple, or the use thereof in fee simple, or for a less estate" either in the manner prescribed in sections 251 and 252 or in sections 360 to 365 of that article.

But notwithstanding these broad provisions, the power conferred can only be exercised for a public use as above defined. because the constitution forbids the taking of private property for a private use, and the Legislature cannot make a private use, public, by declaring it to be such, or by authorizing the exercise of the power of eminent domain for any use which the Courts may determine not to be a public use. The exact subject-matter determined in the *Arnsperger Case*, *supra*, was that land cannot be constitutionally condemned for a *private road for the use of particular individuals, who may lawfully exclude the public therefrom*, and in so determining, it was held, in accordance with what we deemed to be the best authorities, that "the test whether a use is public or not, is whether a public trust is imposed on the property; whether the public has a legal right to the use. which cannot be gainsaid or denied, or withdrawn at the pleasure of the owner," and that "the expressions, public interest and public use are not synonymous." The amended Charter of the appellee was obviously adopted for the purpose of removing any question whether the original charter measured up to that test, and in the belief that the amended charter accomplished that purpose, and it will therefore be necessary to consider only the latter amended charter.

It specifically declares the corporation to be formed "to act as a *common carrier* of electrical power or energy by means of all appropriate or necessary structures-appliances, devices, or processes, now or hereafter capable of being used in the transaction of any business wherein electricity or electric power or energy may be applied to any useful purpose," and it expressly "vests" in "the public in like situation with said Susquehanna Pole Line Company of Harford County, its successors and assigns, whether individuals, partnerships or corporations, a *right*, to apply for and demand of said com-

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pany, all connections and facilities without discrimination or partiality to the extent of the just and reasonable distributing, transforming, carrying and connecting capacity and facilities of said company." It declares that said company "shall and must supply all applicants in like situation as aforesaid, who may exercise said right with the connections and facilities aforesaid, provided such applicants comply or offer to comply with all *reasonable* rules, regulations, terms and rates of said company;" and it declares that said company shall not impose any conditions or restrictions upon any such applicant not imposed impartially upon all other persons, partnerships or corporations in like situation; and that said company shall not discriminate against any such applicant or between any such applicants, engaged in any lawful business, by requiring as a condition for furnishing such facilities that the same shall not be used in the business of said applicant, or otherwise for any lawful purpose."

The language of the amended charter as given above is not that of the appellee's counsel, and as such subject to the possible suspicion that it was chosen in the interest of the appellee rather than that of the public; but it is the language of the Legislature of the State, to be found in section 336 of Article 23, and employed by it deliberately to indicate that the operation of a telephone company is a "*public employment* and that the instruments and appliances used are property devoted to public use, and in which the public have an interest." *C. & P. Telephone Co. v. B. & O. Tel. Co.*, 66 Md. 415. It is therefore not only appropriate language in itself to declare and impose a public duty, but it has legislative sanction for its employment for that purpose. In the case just cited CHIEF JUDGE ALVEY said: "It is the nature of the service undertaken to be performed that creates the duty to the public, and in which the public have an interest, and not simply the body that may be invested with the power." It is not essential, as contended by the appellant that there should be "a pre-enacted legislative regulation" such as section 336 provided for telephone companies. In

Rockingham Light and Power Co. v. Hobbs, 72 N. H. 531 (66 L. R. A. 585-6), the Court said: "If the plaintiff is under obligation to supply electricity or electric energy at reasonable rates, and without discrimination, to all corporations, public, *quasi* public and private, and to all persons desiring it, who are located within reasonable distances of the plaintiff's lines so far as the extent and capacity of its works will permit, it appears to have all the characteristics of a *quasi* public corporation. * * * The delegation of the power of eminent domain to a corporation is not always accompanied with an express imposition of the obligation to serve the public reasonably and equitably. A corporation, by the acceptance and exercise of the power impliedly undertakes such service respecting the subject for which the power is exercised. *Lombard v. Stearns*, 4 Cush. 60; *Trenton & N. B. Turnpike Co. v. American Commercial News Co.*, 43 N. J. L. 381."

So in *Brown v. Gerald*, 100 Maine, 372, it was said: "It is generally well settled now that when the Legislature grants to a corporation the right of eminent domain, or public rights, like street rights for public uses, and the corporation accepts and exercises the grant, it thereby impliedly comes under obligation to the public to perform all those duties in which the public are interested, and to aid in the performance of which the right of eminent domain was granted. *It can be compelled to perform them, and at reasonable rates.* It subjects itself to public regulation and control, and to forfeiture of its charter for failure to perform." In the case now before us the appellee has written into its charter the obligation to the public to perform all those duties in which the public is interested, and this charter being granted under the general law of incorporation, that obligation is as much a part of its organic life, as if contained in a legislative charter directly to the appellee. But unless the grant was for public uses, the appellee cannot, either impliedly by acceptance of the grant, or by incorporating obligations into its charter, come under any obligation to the public or obtain any rights as a

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public instrumentality. The ultimate question is, and must be, whether the uses declared in the charter are in law public uses.

Mr. Lewis in his work on Eminent Domain, section 173 says: "The condemnation of property for public sewers, or works for the disposition of sewage, or for supplying a city or town with water or gas, is so manifestly a public use that it has been seldom questioned and never denied." And in section 160 he says: "In determining whether the use is public or not, it is an immaterial consideration that the control of the property is vested in private persons who are actuated solely by motives of private gain. Railroads, canals, turnpikes and ferries are familiar instances of such appropriation, and the principle is of universal application. 'The inquiry must necessarily be, what are the objects to be accomplished, not, who are the instruments for attaining them.'" Nor need the use be for the whole public. "It may be for the inhabitants of a small or restricted locality; but the use and benefit must be in common, not to particular individuals or estates." *Idem*, sec. 161. Mr. Joyce, in his work on Electric Law, sec. 277, says: "The planting of poles and stringing of wires for the purpose of street lighting, and supplying light to citizens, is one of the uses to which the streets of a city may be devoted, and is a public use.

. In *State, ex rel. v. Toledo*, 48 Ohio St. 113,, it was held that the supplying of municipal corporations and their citizens with natural gas, is a public use or purpose for which the taxing power may be constitutionally exercised; and in the course of the opinion the Court observed that though that was a case of taxation and not of eminent domain, yet it was to be considered upon the principles governing eminent domain. If supplying the public with water or gas is so manifestly a public use as not to be questioned, upon what just principle can it be held that supplying the public with electric light is not a public use? In *Brown v. Gerald*, 100 Maine, the defendant was empowered to generate, sell, distribute and supply electricity for lighting, heating and man-

ufacturing purposes in certain towns, and to take by the exercise of the right of eminent domain, land for the establishment of its plant, which the Court held embraced its line of poles and wires. The case was for an injunction to restrain the erection of the line across the plaintiff's farm. The defendant contended that it had the right to take the plaintiff's land for the purpose of furnishing an electric current for lights, whether it could do so for supplying power for manufacturing purposes or not. The Court said: "We think it should be conceded that the taking of land for the purpose of supplying the public, or so much of the public as wishes it, with electric lighting, is for a public use," and also held, that "if the company exercised the right actually for lighting purposes, it might also use the property thus obtained for other incidental purposes, as has been many times held." But the Court found under the testimony taken in the case that the land was being taken to enable the company to deliver electrical power to a manufacturing company *under a contract*, and that the alleged public use was a mere cover for a private enterprise, and the injunction was for *that reason only*, sustained.

In *Walker v. Shasta Power Co.*, 160 Fed. Rep. 856, the Court said: "It has been generally held by the Courts that the generation of electric power for distribution and sale to the public on equal terms, is a public enterprise." And in *Minnesota Canal and Power Co. v. Koochiching Co.*, 97 Minn. 429, it was said: "Electric lighting is universally recognized as a public enterprise, in aid of which the right of eminent domain may be invoked." And in *Canal Power Co. v. Pratt*, 101 Minn. 212, it was held that the term "public business" includes the construction of works for supplying the public with light, heat and power.

In *New Central Coal Co. v. Georges Creek Co.*, 37 Md. 563, it was held through CHIEF JUDGE ALVEY, that the Legislature may authorize the condemnation of private property by a mining company for the construction of a railroad to bring coal from its mines, "such use being of a public

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nature." And in *N. Y. Mining Co. v. Midland Co.*, 99 Md. that decision was confirmed, CHIEF JUDGE MCSHERRY saying that a mining company could condemn land for the construction of a connecting railroad, though it had no motive power of its own, and he pointed out that such use was a public use, for the reason, among others, "that other railroad companies or mining companies would have the right to run over it and to use it in the method prescribed by the statute." The Courts of Pennsylvania, as observed by JUDGE ALVEY in *New Central Coal Co.'s Case*, *supra*, have very fully sustained "the right to take by compulsory process, land for the construction of lateral railways to coal mines, as being for public use, and therefore within the power of the eminent domain," and this notwithstanding that the test for determining a public use which we adopted in the *Arnsperger Case*, 101 Md., was the test applied in *Farmers Market Co. v. P. & R. R. Co.*, 142 Pa. St. 586, upon which case the *Arnsperger Case* largely was determined. Even in the cases cited in the appellant's brief as against the validity of the power in this case, there are to be found expressions going far to sustain the view that the supplying of electric light, heat or power to the public, is a public use. Thus in *Fallsburg v. Alexander*, 101 Va. 110, the Court held that the interest of the public, if any, under the language of the charter was too vague and indefinite to support the power of eminent domain, but also said: "We do not mean to say however that under no conditions can the right of eminent domain be conferred by the Legislature in furtherance of the establishment of plants for the generation of electric power, or other power, light or heat, where public necessity requires it and the public use is apparently safely guarded. To meet industrial progress, new conditions, and the ever increasing necessities of society, the Courts have gone very far in sustaining legislation conferring the franchise of eminent domain, and it is not necessary for us in this case, if we were

so inclined, to question the soundness of the policy sustained in those decisions."

We think that the language of the appellee's amended charter amply safeguards the right of the public to the use of the electric current to be conveyed over the pole line, and that we are well within the principles laid down in the *Arnsperger Case* in holding that the right of eminent domain may be exercised by the appellee for the purposes indicated in its amended charter.

But it is further contended by the appellant that some of the purposes of the appellee as set forth in its charter cannot be held to be public uses, and therefore the power of eminent domain cannot be exercised at all.

But this is only when a private use is combined with a public use in such a way that the two cannot be separated. 1 *Lewis on Eminent Domain*, sec. 206. The case of *Harlan v. Centralia Elec. Power Co.*, 42 Wash. 633, states what we deem to be the true doctrine in this respect. There the Court said: "The objects for which the corporation was formed, as recited in its articles, are many and somewhat varied, and those of a public and *quasi* public nature are commingled with those that are purely private. * * * The relator contends therefore, to permit it to condemn property at all, is to permit private property to be taken for a private use. There are cases which maintain the doctrine that a statute authorizing the condemnation of property for uses, a part of which only are of a public nature is in violation of the rule that private property cannot be taken for private use, and hence cannot be enforced. * * * If a private use is combined with a public one in such a way that the two cannot be separated, then, unquestionably, the right of eminent domain could not be invoked to aid the enterprise, but it has been said, and it seems to us that it is the better reason, that where the two are not so combined as to be inseparable, the good may be separated from the bad, and the right exercised for the uses that are public. * * * While the exercise of the right of eminent domain must be guarded jealously so that the

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private property of one person may not be taken for the private use of another, after all is said and done, the power to prevent property taken for a public use from being subsequently devoted to a private use must rest rather in the supervisory control of the State, than in caution in permitting the exercise of the power. Property taken for a public use by a corporation organized solely to promote a public business, may be as easily diverted by it to a private use as it may by one having both private and public objects."

And in *The Lake Koen Nav. Co. v. Klein*, 63 Kan. 485, it was said: "We see no greater reason for denying to a private corporation the power of eminent domain for the promotion of a public use, because by its charter it is also authorized to engage in a private enterprise, than to deny to a private person the same power, because he is inherently endowed with the same authority."

But it is further contended by the appellant, that there is no provision of law for determining the *necessity* of the taking, either by the jury of inquisition or by a Court of competent jurisdiction, and the taking therefore is without due process of law, both under the Constitution of the State, and the Fourteenth Amendment to the Constitution of the United States. But in *New Central Coal Co. v. George's Creek Coal Co.*, 37 Md. 565, speaking of the necessity of the taking the Court said: "It is proper that these questions be referred exclusively to the Court specially clothed with jurisdiction and power to pass on the propriety of the inquisition of condemnation;" and in *N. Y. Mining Co. v. Midland Co.*, 99 Md. 513, JUDGE McSHERRY said: "There could be no more conclusive reason for refusing to confirm the inquisition than the non-existence of a necessity for an acquisition of the land sought to be condemned. Whether such a necessity did in point of fact exist, was obviously a question for the Court below to determine upon the objections filed before the inquisition could be confirmed." The case before us has not reached a stage for the consideration of that question. As was said in *New Central Coal Co.'s Case*, *supra*: "In the

delegation of the power is implied the condition that it shall only be exercised when, and to the extent actually found necessary. This rule however, may, and generally does involve questions of engineering and other questions that a Court of Equity cannot undertake to determine."

Again, it is contended that the appellee, even if it has a valid power of eminent domain under section 366 of Article 23, cannot take both a fee simple, or the use in fee simple, of the parcel described in the application and warrant, and also an easement to cut and trim trees and other obstructions which may fall upon or interfere with the use of said parcel of land, for the reason that the language of section 366 is in the disjunctive, "the use thereof in fee simple, *or* for a less estate." We cannot adopt so narrow and strained a construction. To compel the appellee to condemn the use in fee simple of *the whole*, when the use in fee simple of *part*, together with an easement in adjoining land would be ample, would be an arbitrary and unreasonable construction to impose upon the language of the law. It cannot be doubted that if the appellee had only asked for the use in fee of the parcel described, and after occupying it had discovered that it was necessary to have the right to cut and trim trees and bushes interfering with the use and occupation of the parcel first taken, that it could have a second inquisition for that purpose; and there can be no reason why it should not be allowed to take in one proceeding, upon proof of necessity, what it could take in two proceedings.

Finally it is contended that under the general and unrestricted power of amendment given to corporations organized under the general law, the appellee could, after acquiring the appellant's property, for the public uses which we have said are imposed upon it, under its amended charter, divest itself of such public uses, merely by another amendment, repealing or striking out all the provisions of the original amendment, with the result that it would then hold for private uses, property condemned for a public use.

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But this result cannot be accomplished under the law.

We have said that the appellee is a *public service* corporation. Section 51 of Article 23, as amended by the Act of 1908 while permitting corporations in general to apply for voluntary dissolution, expressly withholds this power from *public service corporations*, and it can require no argument to show that such a corporation could not by amendment, accomplish what it could not do by attempted dissolution. By that provision of the law the State declared its purpose to retain absolute control over public service corporations and to forbid them, by any method or device, to divest themselves of their duties and obligations to the public. The State could for proper cause forfeit the charter of a public service corporation, but its power is just as clear to control its conduct as such, and to compel by mandamus the performance of its public duties. *C. & P. Telephone Co. v. B. & O. Tel. Co.*, 66 Md. 419.

But it would be an injustice to assume that the appellee would attempt to do what the law forbids.

In *McMeekin v. Central Carolina Power Co.*, 80 S. C. 512, the Court said: "The language of section 5 of the Act plainly imposes upon the defendant a public duty and the petition assumes that the defendant will not comply with the requirements of the statute. It would be prejudging the case to decide that question at this time." And the same is substantially held in *Brown v. Gerald*, 100 Maine, 372, and in *Rockingham County L. & P. Co. v. Hobbs*, 66 L. R. A. 586. In the latter case the company's charter had been amended, as in this case, with a view to a clearer imposition of a public use upon the property proposed to be taken, and the Court, after saying that the public thereby acquired a right to the service of the corporation upon equal and reasonable terms, said further: "In addition to the plaintiff's duty in this regard the Legislature have power to control the plaintiff in its dealings with the public * * * and this furnishes additional assurance that corporations engaged in the

public service, as well as other corporations, shall perform their duties to the satisfaction of the public."

In this State all charters granted or adopted since the Constitution of 1867 may be altered from time to time and repealed at the pleasure of the Legislature, and any corporation may forfeit its charter by non-user or misuser of its franchises.

In any such case where the *use in fee* had been condemned as authorized by the statute, there are not wanting authorities of high character holding that this should be treated as a qualified fee simple determinable when the public use ceases, and that the land would revert if the company ceased to use it for the purposes for which it was taken, or upon forfeiture of the company's charter. 1 *Lewis on Eminent Domain*, section 278. *The People v. White*, 11 Barb. 28; *Hooker v. Utica Turnpike Co.*, 12 Wend. 371; *Raleigh R. R. v. Davis*, 2 Devereaux & Battle, 467. But that question does not properly arise in this case, and we are not to be understood as deciding it or attempting to decide it, in advance of its presentation.

It results from what we have said, that none of the constitutional objections made by the appellants can be maintained, and the decree refusing the injunction and dismissing the bill must be affirmed.

Decree affirmed, costs above and below to be paid by the appellants.

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Syllabus.

SUMWALT ICE AND COAL COMPANY vs. KNICKERBOCKER ICE COMPANY.

Waiver of Right—Instruction to Jury Concerning—Failure of Seller to Deliver Part of Goods as Demanded—Waiver of Right to Rescind Contract Not Waiver of Claim for Damages—Authority of Agent to Cancel Contract—Evidence.

In determining whether there has been a waiver or not it generally happens that there are facts which must be submitted to the jury, but the Court should instruct them as to the legal effect of their finding such facts.

When the question of waiver *vel non* depends upon the evidence in the case, it is error to leave to the jury the broad question whether there was a waiver, without any indication of the particular facts they must find in order to infer a waiver.

When a contract requires the seller to deliver goods as demanded during a certain period of time, and he fails or refuses to make a delivery as requested, thus giving to the buyer the right to rescind the contract, then, if the buyer afterwards demands and receives other goods, he may be held to have waived his right to rescind the contract. But by thus waiving his right to rescind, the buyer does not waive his right to claim damages for the breach by the seller's failure to make the prior delivery as demanded.

Thus, where a buyer was entitled to demand 600 tons of ice each week during a certain period, and the seller refused or was unable to deliver more than 300 tons, the buyer, merely by accepting the 300 tons, does not waive his right to the stipulated amount, and is not prevented from afterwards recovering damages for the failure of the seller to deliver that amount.

The defendant, an ice company, agreed to sell and deliver to the plaintiff such quantities of ice as the plaintiff might require during two years at designated prices. The plaintiff

agreed to take not less than 6,000 tons in the first year, but it was stipulated that the defendant should not be required to deliver more than 12,000 tons in each year, or more than 600 tons in each week. Before the expiration of the time limited for the duration of the contract, the plaintiff brought this action to recover damages, alleging that the defendant had failed to deliver the stipulated number of tons, although the plaintiff had demanded the same at certain times. After the institution of the action, the plaintiff continued to take ice from the defendant under the contract. *Held*, that it was necessary for the plaintiff, under the terms of this agreement, to make demand or give notice to the defendant of the quantity of ice required each week.

Held, further, that an instruction is erroneous which declares that if the plaintiff made a demand for ice as required, but that afterwards, either upon the request of the defendant or upon its protest that the furnishing of such ice was not within the terms of the contract, the said demand was waived, then the same may be treated as never having been made. This instruction fails to state what was necessary to constitute a waiver or what agent of the plaintiff was authorized to waive the demand.

Held, further, that a mere request by the defendant that the plaintiff should sell as little ice as possible consistent with his engagements, was not a refusal by the defendant to furnish ice under the terms of the contract, and did not relieve the plaintiff from the necessity of making a demand for the quantity of ice required.

The fact that an officer of a corporation had the power to make a contract for it does not prove that he had the power to cancel a contract after it is made.

Decided February 4th, 1910.

Appeal from the Superior Court of Baltimore City (NILES, J.).

Plaintiff's 3rd Prayer.—That under the evidence in this case the plaintiff was entitled to demand ice from the defend-

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ant in amounts up to 600 tons in any or each and every of the weeks within the said contract during the first year thereof, until 12,000 tons had been delivered, and that if it finds from the evidence that at a time when the plaintiff was entitled to the ice under the contract in evidence in this case, if it shall so find, the defendant advised the plaintiff that it could have no ice except for the regular trade enjoyed by it prior to the condition existing as a result of the ice shortage of that year, if it should so find or advised the plaintiff to take no new trade but to let off all the trade that it possibly could, otherwise the said defendant would not have sufficient ice to supply the needs of the plaintiff, that then the plaintiff was thereby absolved from the necessity of specifically demanding of the defendant ice for any purpose other than for its said regular trade so existing independent of the said conditions resulting from the said ice shortage, if it should so find, and that any neglect on the part of the plaintiff to make demand in excess thereof shall in no wise bar or preclude the plaintiff in this suit. (*Refused.*)

Defendant's 7th Prayer.—That it was perfectly legitimate under the terms of the contract sued on for the defendant to request and urge the plaintiff, its servants and agents, to sell as little ice as consistent with their engagement and not to take on any new trade, provided that the Court so sitting shall find that such request and urging was not in reality a refusal to furnish ice under the terms of the contract, but a mere expression of desire on the part of defendant. (*Granted.*)

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

William S. Bryan, Jr., and E. Allan Sauerwein, Jr., for the appellant.

Edward C. Carrington, Jr., (with whom was Campbell Carrington on the brief), for the appellee.

Boyd, C. J., delivered the opinion of the Court.

The appellant sued the appellee for an alleged breach of contract to furnish it ice. There was a written contract between the parties which contains, among other provisions, the following: "That the said party of the first part (the appellee) will sell to the said party of the second part (the appellant) and the said party of the second part agrees to purchase of the said party of the first part, such quantities of ice, as the said party of the second part may require in its business from the first day of April, 1906, to the first day of April, 1908, at the following platform prices." The prices per ton, varying from \$1.75 to \$2.25, are then set out from April, 1906, to March, 1907, inclusive, and \$2.25 is the price named from April 1st, 1907, to October 1st, 1907, and \$1.75 from October 1st, 1907, to April 1st, 1908, and it is then stated: "All bills for same to be payable at the end of each week."

By the contract the appellant agreed to take as a minimum amount six thousand tons during each and every year of the contract, and to pay fifty cents for each ton short of that minimum quantity, and it was agreed that the appellee was to incur no liability for a failure to deliver during the first year a greater quantity than twelve thousand tons, or in any week during the first year more than six hundred tons, and for the second year the quantities named were fifteen thousand tons for the year, and seven hundred and fifty tons per week. The appellant agreed not to sell to certain companies named in the contract and each party agreed not to sell to the customers of the other party.

This suit was instituted on November 7, 1907, but the appellant continued to purchase ice throughout the period named in the contract—from April 1st, 1906, to March 31st, 1908. At no time were six hundred tons furnished the appellant in a week, and during the first year something less than ten thousand tons and during second year about nine thousand five hundred and forty-eight tons were received, according to the statement filed by the appellant. The case was tried be-

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fore the Court, without the aid of a jury, and, a verdict having been rendered in favor of the defendant, this appeal was taken from the judgment entered thereon. During the trial four exceptions were taken—the first three being to the refusal of the Court to permit certain questions to be answered, and the fourth to the rulings on the prayers. The plaintiff excepted to the action of the Court in granting the defendant's third, fourth and seventh prayers, in refusing the plaintiff's third and in granting its own instruction in lieu thereof, and in overruling the plaintiff's special exception to the Court's own instruction.

As the appellant complains especially of the Court's own instruction, we will first consider that. It was as follows: "If the Court sitting as a jury shall find from the evidence that the plaintiff made demand upon the defendant for ice required by the plaintiff in its business, under the circumstances set out in the plaintiff's second prayer as giving the plaintiff the right to make such demand, and if the Court so sitting shall further find that in making such demand the plaintiff stated the particular purpose or purposes for which said ice was desired. And if the Court so sitting shall further find that the defendant refused to furnish the ice so demanded, and also refused to furnish any ice to plaintiff for the purpose or purposes so specified. And if the Court so sitting shall find that said last mentioned refusal was such that plaintiff might reasonably consider it deliberate and final, then such refusal excused the plaintiff from making any other demand for ice for such purpose or purposes; and the Court sitting as aforesaid may allow plaintiff damages, according to the rule set out in the plaintiff's fourth prayer, on account of such ice as it may find from the evidence that plaintiff required for such purposes, (it) would have demanded had it not been for such refusal. If, however, the Court, so sitting, shall find that a demand or request for ice required as aforesaid was made, but shall further find from all the facts and circumstances of the case that afterward, either upon request of the defendant or upon its *bona fide*

protest that the furnishing of such ice was not within the terms of the contract, the said demand of the plaintiff was waived, then the Court, so sitting, may treat such demand as never having been made."

There can be no doubt that there was evidence tending to prove that the plaintiff did not get all the ice it wanted during the months of June, July, August and September, 1906, and that it was demanding more. Mr. Hammond, the president of the plaintiff, testified that Mr. Kirkpatrick, the vice-president and general manager of the defendant, notified him about the first or second of June, that they must not take on any new trade and must let off all the old trade possible, that he would not deliver ice for new trade, as there would not be ice enough for them. He said similar notices were frequently received from Mr. Kirkpatrick, and offered in evidence a letter from him dated June 11, 1906, in which he spoke of the supply of the ice being short, that his company had not taken on any new trade, and said: "Our contract with you stipulates that you shall not interfere with our business in any way, and at the time this contract was made it was understood that when the shortage in the market did arise this season you would not sell ice in wholesale quantities to any trade that we might serve if we cared to take it on, but that you would confine yourself strictly to your business as retail ice dealers." The next day Mr. Hammond replied: "We deny most emphatically the existence of any verbal agreement or understanding, either past or present, concerning our supply or sale of ice, and respectfully refer you to our written contract. The only possible help or encouragement that you can contribute to the Sumwalt Ice and Coal Company is the carrying out of this contract. In conclusion let me say that the Sumwalt Ice and Coal Company are not disposed to surrender any of their rights under this written contract with the Knickerbocker Ice Co." He testified that: "The plaintiff continued hauling ice from the defendant's platform, receiving short supply all the time, yet demanding full supply, as its drivers were daily complaining that they

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had not enough ice for the trade." He said they made demand for ice to fill carload orders, and with the exception of eight tons for Pen Mar and eleven to McCall's Ferry "we were refused most positively, and in some cases, insultingly." He also said they had received on the 29th of June an order from the Gardiner Dairy Company for twenty tons a day for the month of July or longer, at \$5.00 a ton; that they started to deliver it the next morning, when the defendant informed them that they could have no ice for that company and that if they did not stop delivering to it their entire supply would be cut off; "that there was not one day during that season that his wagons got within many tons all the ice they needed for their trade." On August 1st, he wrote complaining of inconvenience to which they were being subjected by being compelled to send their wagons from four to six blocks out of the way, to get inferior natural ice, and of the delays caused by not having enough men on board the vessels and in the house to properly deliver ice to them, and concluded by saying: "You must also know that your refusal and failure to deliver ice to us in such quantities within the maximum of our contract of March 19th, 1906, as we have had occasion to order of you is causing us pecuniary loss, for which we have a right to expect an accounting of you." There is other evidence tending to show that the plaintiff was demanding ice according to the contract, and that it was not receiving what it was entitled to have.

This case is somewhat peculiar in that the contract did not require the appellant to take any definite quantity of ice every week, but it was only required to take six thousand tons each year, but, although the appellee was required to deliver twelve thousand tons a year, not more than six hundred tons in any one week, it was necessary for the appellant to make some demand or give notice to the appellee of the quantity it wanted, for the reason that the appellant could have averaged only about one hundred and fifteen tons a week and have complied with its part of the contract, but it had the right to demand six hundred tons. In other words there

was no default on the part of the appellee merely because it did not deliver six hundred tons in a week, but there must have been some demand for it by the appellant. There is also evidence on the part of the appellee tending to show that it did furnish all the ice that was demanded of it, excepting some which the appellee contended it was not bound to furnish under the contract. We suppose this instruction refers particularly to carload lots and to that to be furnished to the Gardiner Dairy Company, both of which the appellee contended it was not bound under the contract to furnish.

The principal defect in this instruction was leaving to the Court, sitting as a jury, to determine whether the demand was waived without stating what was necessary to constitute a waiver, or who could waive it. It is true the case was tried before the Court, but the instruction was to it as a jury, and it is impossible to tell from it what the Court regarded as sufficient in law to be a waiver, or what agents of the appellant it thought could waive. In determining whether there has been a waiver, it generally happens that there are facts which must be submitted to the jury, but the Court instructs the jury as to the legal effect of their finding of such facts. In *Pentz v. Penn. Fire Ins. Co.*, 92 Md. 444, the instruction as modified concluded: "and shall further find that there was no waiver of the proofs of loss as required by the policy." In passing on that instruction JUDGE SCHMUCKER said: "The portion which we have quoted of this modification was erroneous, as it was unaccompanied by any instruction as to what acts or conduct of the defendant or its agent, of which there was evidence in the case, were sufficient to constitute the waiver. When, as in the present case, the alleged waiver is to be inferred from facts and circumstances resting entirely on parol evidence, the question of waiver *vel non* is one for the jury under instructions from the Court indicating to them the portions of the evidence from which they may infer the waiver, but it is erroneous in such cases to leave to the jury the broad question whether there was a waiver without any indication of what facts they must find from the evidence

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in order to infer the waiver. *Traub's Case* on the first appeal, in 80 Md. 224." See also *Walter v. Bloede Co.*, 94 Md. 90; *Spring Garden Mut. Ins. Co. v. Evans*, 9 Md. 1.

This case illustrates the importance of that rule. Upon a material failure of the appellee to comply with the contract, the appellant had the right to rescind it, but it was not compelled to do so, and it could be held to waive that right by subsequently affirming the contract, by continuing to deal under it. But waiving the right to rescind a contract is a very different thing from waiving a right to hold the other party responsible in damages for a partial failure to comply with it. Merely continuing to purchase ice was not necessarily such a waiver. The testimony shows that the appellant could not get the additional ice it wanted elsewhere, and if it had disaffirmed the contract, and refused to take any ice from the appellee, it might have been seriously embarrassed or even ruined, as it could not have complied with its contracts to furnish its customers. When one party agrees to furnish six hundred tons of ice a week, and it cannot, or will not, furnish more than three hundred tons a week, and the difference cannot be obtained elsewhere, the vendee should not be required either to take the three hundred or none. On the contrary, its refusal to take the three hundred might add unnecessary loss to the vendor. The price for ice during the months of June, July, August and September, 1906, under this contract, was \$2.25 per ton, while the evidence shows that it was selling at from \$4.00 to \$10.00 per ton and that the appellee sold some at \$8.00 and \$10.00 per ton, and it was difficult to get at any price. As we have said, the appellant could have rescinded the contract (assuming, of course, its evidence to be true) but it was not compelled to do so. Yet a jury might have supposed that the mere continuance to take under this contract was a waiver of its right to require the full amount called for by the contract to be furnished.

The appellee has cited such cases as *Bollman v. Burt*, 61 Md. 415, *Md. Fer. Co. v. Lorentz*, 44 Md. 218, and *McGrath v. Gegner*, 77 Md. 340, to sustain the contention that accept-

ance by the plaintiff of ice to the time of the expiration of the contract condoned or waived the breaches which had previously occurred, but in each of those cases the question was whether the contract had been rescinded; and neither of them included such a question as is in this case. Of course, if a party has the right to rescind a contract by reason of a breach by the other party, and then condones or waives the breach, he cannot in a suit against him for a subsequent breach set up the former one, but whether a party can furnish one-half or less of what he agreed to furnish and then claim that he is not liable for damages because the other party accepted the half, although circumstances compelled him to do so, is an altogether different question. If that be so in all cases, then under such circumstances as we have in this case a party can profit by his own wrong, as this record shows such conditions in the ice trade as to make it certain that the appellant was compelled to accept all the ice it could get, or to face possible disaster or ruin.

The character of this contract and the circumstances surrounding its execution show that it could not have been the intention of the parties that the appellant should on default of the appellee be required to either entirely rescind the contract and take no more ice, or to accept what the appellant chose to or could deliver to it without holding the appellee liable in damages. It was known by both parties that there was likely to be a scarcity of ice. Much more of it is used during the summer months than at other times of the year. It is more valuable then, as the prices in this contract show, and the failure to get it then is of more serious consequence than a delay in delivering ordinary articles of merchandise. If a large and strong company could place a smaller and weaker one in the position of either accepting what the former chose to deliver the latter, regardless of the contract, or of rescinding the contract, and relying entirely on a recovery of damages, but little protection would be furnished by the law to those not in a financial condition to await the results of litigation. We do not mean to speak of the appellant

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as a financially weak company, but only intend to illustrate the point by what we have said. Of course, we do not say that the appellant could not have waived its right to have the full amount of ice provided for in the contract, but we do hold that merely continuing to accept a less quantity was not such a waiver.

The appellee referred in a supplemental brief to the case of *Wolfert v. Caledonia Springs Ice Co.*, 195 N. Y. 118, S. C. 88 N. E. Rep. 24, but recovery in that case was based on a rescission of the contract. The Court said: "The recovery in this action is not for some special and incidental damage to the plaintiff, but it is based on a rescission of the entire contract." It did not involve the question now under consideration, and we need not determine whether the New York decision in reference to sales of goods to be delivered in installments can be reconciled with our own. Whether or not another suit can be instituted for breaches which occurred after this suit was brought is not before us, and whether this appellant waived its right to rescind this contract by continuing to accept ice is not involved, as it does not claim to have rescinded the contract, but relies on it. So without discussing other reasons, we are of the opinion that for the one given above there was error in giving the Court's own instruction.

The plaintiff's third prayer was properly rejected. Without discussing it at length, it was objectionable for the reason that it asked the Court to say that if the Court sitting as a jury found that the defendant "advised the plaintiff to take on no new trade, but to let off all the trade that it possibly could, otherwise the said defendant would not have sufficient ice to supply the needs of the plaintiff, that then the plaintiff was thereby absolved from the necessity of specifically demanding of the defendant ice for any purpose other than for its regular trade," etc. The seventh prayer of the defendant, granted by the Court, properly submitted that question. Merely advising the plaintiff as stated in the prayer is not sufficient to relieve it of the necessity of asking for more ice

than it was receiving, if it wanted more. We do not understand the exceptions to the third and fourth prayers of the defendant to be pressed.

There was no error in rejecting the evidence, as offered, which is set out in the first, second and third bills of exception. It is true that Mr. Kirkpatrick was vice-president and general manager of the company and that he signed the contract, but there was no proffer to show that he was authorized to cancel it, or to make an offer for its cancellation. An agent may have authority to make a contract for his principal, but it does not follow that he has power to cancel it, and especially to pay a large sum of money to obtain its cancellation. The record shows that Mr. McKinnon, the president of the defendant, was having some supervision over this contract, and there is nothing to show that he or the company ever vested Mr. Kirkpatrick with such power over the contract as to bind the company by such offers as were proposed to be shown by this evidence. But beyond that, we think that at the time the proffer of the testimony was made the evidence was not relevant, even if it became so afterwards. No witnesses had been produced by the defendant, hence such evidence could not reflect upon the question as to whether those of the plaintiff or those of the defendant were correct in their statements, as suggested by the counsel for the appellant. It is a dangerous character of testimony at best, and the Court was right in rejecting it.

For error in the instruction given by the Court, we must reverse the judgment.

Judgment reversed, and new trial awarded, the appellee to pay the costs.

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Syllabus.

THE ANNAPOLIS GAS AND ELECTRIC LIGHT
COMPANY *vs.* OSCAR FREDERICKS.

Action for Injury Caused by Electric Wire on a Bridge—Evidence—Instructions to the Jury—Inadequate Exception.

When the question is whether an electric light wire, by contact with which the plaintiff was injured, was safely and properly located or not, evidence as to its condition some months after the injury is not admissible.

If an electric light wire was repaired after the plaintiff was injured by contact with it, and was afterwards taken down, evidence as to its condition at the time of the trial is not admissible to show that it was not properly insulated at the time of the accident.

Evidence as to the height of electric wires in a city or elsewhere is not admissible to show that a particular wire was not properly located on a certain bridge.

When the plaintiff in an action against an electric light company alleged that one of its wires on a bridge was imperfectly insulated and sagged down, and that when passing on the bridge he came in contact with it and was injured; while the defendant alleged that the wire was placed beyond the reach of travellers on the bridge, and was safe, and that the plaintiff projected himself beyond the bridge, and so came in contact with it, a prayer offered by the plaintiff is erroneous when it refers in general terms to the place where plaintiff was injured as testified to by his witnesses, and which wholly ignores the testimony offered by the defendant.

A prayer authorizing the plaintiff to recover damages for a permanent injury if the jury find he was permanently injured is not proper when there is no evidence in the case that his injury was permanent.

An exception taken to "the line of argument" of counsel before the jury will not be considered when it fails to set forth the ruling of the Court on the exception.

Decided February 2nd, 1910.

Appeal from the Circuit Court for Anne Arundel County (FORSYTHE, J.).

Plaintiff's 1st Prayer.—If the jury find from the evidence that on or about the eighth day of August, 1907, defendant owned, maintained, operated and controlled a system of wires in Annapolis and in Eastport in Anne Arundel County and upon the bridge spanning Spa Creek and connecting Annapolis and Eastport and that said bridge was a public highway at said time, and that said wires were hung and suspended along the side of said bridge on cross bars attached to the bridge on the top of the iron trusses running along the south side of the bridge, and shall find that said wires were loose and sagging down so close to said bridge that the plaintiff lawfully using said bridge and using due care on his part came in contact with one of said wires, and shall further find that defendant transmitted over or through said wires on said bridge a voltage ranging from five hundred volts to two thousand volts and shall further find that such electric current when coming in contact with human beings is dangerous to life and limb, and shall further find that said electric—were without proper insulation so that the wire transmitting said electric current was exposed and in a condition dangerous to the life and limb of human beings coming in contact therewith by the exercise of ordinary diligence, ascertained that its wires on said bridge were uninsulated and so sagging as to be dangerous, and shall further find that defendant suffered said wires to be and continue without proper insulation and sagging down, and that said wires were in the said condition on the night of August 8th, 1907, and at the place where the plaintiff was injured as testified by the plaintiff's witnesses.

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if the jury so find, and that on the said 8th day of August the plaintiff, while lawfully using said bridge and using due care came in contact with said wire and that said wire was then and there charged with a current of electricity ranging from five hundred volts to two thousand volts, and that thereby the plaintiff was then and there greatly shocked and stunned and his right hand burned and injured, then the plaintiff is entitled to recover. (*Granted.*)

Plaintiff's 2nd Prayer.—If the jury find for the plaintiff, then, in estimating the damages, they are to consider the health and condition of the plaintiff before the injuries complained of as compared with his present condition in consequence of the said injuries; and whether said injuries are in their nature permanent and how far they are calculated to disable the plaintiff from engaging in those business pursuits for which, in the absence of the said injuries, he would have been qualified; and also the physical and mental suffering to which he has been subjected by reason of the said injuries, and to allow such damages as in the opinion of the jury will be fair and just compensation for the injuries which the plaintiff has suffered. (*Granted.*)

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

D. G. McIntosh and *James W. Owens*, for the appellant.

James M. Munroe (with whom was *Robert Moss* on the brief), for the appellee.

BRISCOE, J., delivered the opinion of the Court.

This case comes before the Court upon a second appeal. The first appeal will be found reported in 109 Md. 596.

On the first trial, there was a judgment, on verdict, in favor of the plaintiff for \$500 and this judgment on appeal to this Court was reversed for errors in the ruling of the

Court below and a new trial was awarded. Upon a second trial, the plaintiff recovered a judgment of \$400 and the defendant brings this appeal.

The questions on the record now before us are presented by eight bills of exception reserved and taken by the defendant in the course of the trial in the Court below. Six of these relate to the rulings of the Court upon the evidence, the seventh, to the action of the Court in granting the plaintiff's first and second prayers, and in overruling the defendant's special exceptions to these prayers, and also, to the ruling of the Court in rejecting the defendant's, first, second, fourth and sixth prayers. The eighth exception purports to embrace an objection by the defendant to a line of argument on the part of the plaintiff's attorney in the course of the trial in the Court below. The exception is in these words: "And at the argument of the case, in the course of argument the attorney for the plaintiff stated, that the plaintiff had offered but two prayers both of which had been granted, and that the defendant had offered seven, some of which were granted and some were rejected, to which line of argument on the part of the plaintiff's attorney the defendant excepted and prays the Court to sign this its eighth bill of exceptions, which is by the Court accordingly done this 28th day of September, 1909."

We will consider these exceptions in their regular order. in so far as the questions presented by them were not passed upon and determined by us, on the former appeal.

It will be seen from the record that there was no difference in the pleadings on the second trial, and the essential facts were practically and substantially the same as on the first trial.

The appellant's counsel insists in his brief that the circumstances under which the plaintiff suffered the injury as set forth in the record are substantially the same as described in the record in the previous case tried in this Court, and reported in 109 Md. 598. And we find this statement is fully

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confirmed by an examination and comparison of the two records, and is in no way controverted by the appellee.

The suit was brought by the appellee against the appellant company on the 13th day of January, 1908, in the Circuit Court for Anne Arundel County to recover damages for an injury alleged to have been sustained by him by contact with an electric wire charged with electricity, maintained and operated upon a public bridge connecting the City of Annapolis and the village of Eastport, Anne Arundel County.

The declaration alleges as the basis of the suit that the bridge is a public highway and the wires are hung and suspended over and upon poles controlled by the defendant upon the streets of the city and village and upon the bridge for the purpose of doing a general electric light business in the City of Annapolis and the village of Eastport. It also charges that these wires were permitted to become and be without proper insulation and by reason thereof contact with the wires was dangerous to life, and the defendant while lawfully using and passing over the bridge, without any negligence on his part, came in contact with the wires and was injured.

The evidence upon which the plaintiff relies to sustain the judgment in this case is fully set out in the opinion in the former appeal and we shall refer only to such differences as may appear in the record in this case as we may find necessary to determine the question whether or not the Court committed any error in its rulings on the second trial, as to justify and warrant a reversal of the judgment on this appeal.

The first exception was taken by the defendant to a question propounded, and the answer given by Judge James R. Brashears, a witness called on behalf of the defendant.

Judge Brashears testified that he was familiar with the condition of the appellant's electric wires over Spa bridge, because he lived near Eastport and had travelled over the bridge at least twice a day of each week including Sunday. He further testified that he was familiar with the condition

of the wire previous to and up to the time of the accident and the wire seemed to him to be out of the reach of any one, unless a person sprung out and grabbed it, and that it was not dangerous to persons travelling over the bridge.

He was, then, asked the following question: Q. 4. "Have you recently examined that wire." Answer, "Yes." The record then shows the following entry: "(Objected to by counsel for the plaintiff and objection sustained, to which ruling of the Court the defendant reserves an exception.)"

Assuming that this objection was presented in time and the ruling of the Court was upon the question propounded to the witness, we fail to see any error in the ruling of the Court in sustaining the plaintiff's objection. An examination of the wires at the place of accident in September, 1908, could reflect no light upon the position or condition of the wires in August, 1907, the date of the accident. According to the proof, the wires had been repaired along the line from time to time after the accident, and after the storm, on the 4th of March, 1909, they were "all taken down, and new wire put up."

The second and third exceptions present offers of proof by the defendant along the same line, and will be considered together.

It appears that after the ruling set out in the first bill of exception, the witness was asked, "did you make an examination of that wire in company with Mr. Owens, counsel for defendant recently," offering to follow up the same by proof that at the time of said examination, the position of the wire on the bridge was the same as it was at the time of the accident.

And by the third exception, it appears that after the witness Crosby, an electrical constructor, had testified on the part of the defendant that the uninsulated places on the wires had been repaired from time to time, and that after the storm of March, 1909, he had removed all the wires over Spa Bridge and that he had "that wire" in the Court House, "exactly as it was when he took it down," the defendant of-

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ferred to produce the wire in use at the time of the accident and to follow up the same by proof that the wire is now in the same condition as it was at the time of the accident so far as insulation is concerned witness could not say, whether repair to places after accident was not at place of accident for the purpose of contradicting the plaintiff's witnesses as to the extent to which the wire was uninsulated and exposed at the time of the accident.

The Court sustained the plaintiff's objection to this character of testimony and these rulings form the basis of the second and third bills of exception.

It is hardly necessary to cite authority to sustain the rulings of the Court on these exceptions under the facts of this case.

On the former appeal, we said, the general rule is well settled that evidence of the subsequent condition of the place where the accident occurs is not admissible to show a negligent condition at the time of the injury because the question of negligence is to be determined by the actual condition at the time of the injury. There are certain well recognized qualifications and exceptions to this rule, but as the facts of this case do not bring it within any of these exceptions, they need not be discussed here. We further said this character of testimony was too remote and misleading to reflect any light upon the question of negligence involved in the case. *Electric Light Co. v. Lusby*, 100 Md. 650; *Ziehm v. United Electric Co.*, 104 Md. 52.

The case of *Brooke v. Winters*, 39 Md. 509, relied upon by the appellant, is in no way in conflict with the cases above cited. It was said, in *Brooke v. Winters*, *supra*, whether the proposed proof of facts subsequent to the suit, was admissible or not, did not depend upon the time of their existence before or after the suit, but upon their *relevancy* to the *issue* and *their capability of explaining it*.

The position of the wire upon the bridge in 1909, nearly two years after the date of the accident in this case would afford no fair or reasonable presumption as to the position of

the wire at the date of the accident, because the whole line had been taken down and a new one put up. The condition of a place or thing at the time of an injury says Mr. Wigmore, in his work on *Evidence*, page 367, may always be evidenced by showing its condition before or after that time provided no substantial change has occurred.

Nor do we find any error in the ruling of the Court in refusing to permit the defendant to produce the wire in use at the time of the accident. This wire, as we have seen, had been repaired from time to time after the accident, and had been so damaged by the storm of March, 1909, that it had to be removed, and new wire substituted therefor.

It would be exceedingly dangerous and obnoxious to the well established rules of evidence, to permit the introduction of this character of testimony, after such a length of time, and after the wires had been repaired and had been subject to such use, for the purpose of showing that they remained in the same condition as at the date of the accident. It would not be relevant to the issue nor capable of explaining it, but entirely too remote and misleading. *Md. D. & V. R. Co. v. Brown*, 109 Md. 319; *Columbia R. R. Co. v. Hawthorne*, 140 U. S. 202.

The fourth, fifth and sixth exceptions are practically the same and are to questions and answers, asked of the witness Miller, on cross-examination.

The exceptions to the admission of this evidence, we think, were properly taken. The questions were improper on cross-examination and the testimony elicited was not relevant to the issue in the case. It was calculated to mislead the mind of the jury. The height of the wires above the surface of the ground in the streets of Annapolis and their distance above the level of the streets, could furnish no correct guide, in determining the proper disposition of the wires on a bridge over Spa Creek. And whether or not they were suspended like those on Light Street Bridge, Baltimore, had no bearing whatever upon the issue in this case. There was error in these rulings and it would be idle to hold the admission of

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this character of evidence was "error without injury." *Sims v. American Ice Co.* 109 Md. 72.

We come to the rulings on the prayers and shall request the reporter to set out the plaintiff's prayers in the report of the case. The plaintiff's two prayers were granted. The defendant's first, second, fourth and sixth prayers were refused, and the third, fifth and seventh were granted. The defendant's prayers contain the same legal propositions presented on the former appeal and what we said in regard to these prayers on that appeal, we find applicable here.

The defendant's granted prayers we think, gave it all the law to which it was entitled and for the reasons stated on the former appeal its other prayers were properly rejected.

The plaintiff's first prayer, it will be seen was not properly framed, and the omission of the words "Defendant," and "could have" in the body of the prayer, renders it somewhat vague and unintelligible. The vice of the prayer, however, consists in locating "the place where the plaintiff was injured as testified by the plaintiff's witnesses" alone. The prayer was entirely too general and indefinite. It ignored the theory of the defendant's case, and the testimony offered in its support.

While the trial Court is not bound to modify instructions submitted by counsel so as to make them correct statements of the law, the Court should refuse an incorrect prayer, not sanctioned by the rules of law. *Dodge v. Hughes Co.*, 110 Md. 382; *Birney v. Tel. Co.*, 18 Md. 357; *Hutzler v. Lord*, 64 Md. 534.

The plaintiff's second prayer was the usual damage prayer, but there was no proof whatever in this case to support the hypothesis of fact stated in the prayer that the plaintiff's injury was permanent.

The defendant's special exception to this prayer, on the ground there was no evidence that the injuries complained of are permanent in their nature should have been sustained and the prayer refused. There was no evidence upon which this instruction could be based, and it is error to grant an

instruction upon any proposition, when there is no proof to sustain it.

Similar instructions have frequently been disapproved and held to be erroneous and prejudicial by this Court. *Long v. Eakle*, 4 Md. 454; *Balto. v. Poultney*, 25 Md. 18; *Wilson v. Merryman*, 48 Md. 328.

The eighth bill of exception purports to present an objection by the defendant to a "line of argument" on the part of the plaintiff's attorney "in the course of the argument of the case," but it does not state any ruling of the Court thereon. It is, therefore, immaterial for us to express any opinion as to the statement set out in the record.

For the errors indicated, the judgment will be reversed and a new trial will be awarded.

Judgment reversed, and a new trial awarded, with costs.

STANLEY A. FOUTZ ET AL. vs. GEORGE W. MILLER
ET AL.

Liability of Directors of Corporation for Mismanagement.

The directors of a corporation are not personally liable for the consequences of their unwise management of its business, but are liable only for gross negligence or fraud.

A bill by the receivers of an insolvent savings institution against the directors alleged that its funds were wasted and lost on account of the negligence and extravagance of the defendants, and charged that they were personally liable for the loss. *Held*, that the evidence shows that the defendants acted in good faith, and had loaned the institution more money than they had received from it in salaries; that all the money paid to the institution was fully accounted for; that the losses

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were caused by honest mistakes of judgment, and that consequently the defendants are not liable therefor.

Decided February 4th, 1910.

Appeal from the Circuit Court No. 2 of Baltimore City (SHARP, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS and PATTISON, JJ.

E. Allan Sauerwein, Jr., (with whom was *John J. Hurst* on the brief), for the appellants.

Howard Bryant, for the appellees.

BURKE, J., delivered the opinion of the Court.

The appellants on this record are the receivers of the Fraternal Savings Association of Baltimore City, a corporation organized under the laws of Maryland. Its objects were "to furnish a safe and profitable system for investing money, in either small or large sums, in a manner which assists and encourages savings, such savings to be readily converted into cash, if desired, and increased profits awarded those who persist in saving through a term of years; to promote industry and thrift by aiding those wishing to acquire a home or place of business to do so on an easy monthly payment plan, costing but little, if any more, than the rental of the same property." These objects were to be obtained by having a home office as a distributing point, and branches or advisory boards in other towns and States. Each local branch having supervision of the association's affairs for the town, and all operating under one charter and plan.

The association began business on October 19th, 1899, and was placed in the hands of the appellants, as a insolvent corporation, on the 25th of July, 1901, so that the period of its active work was about twenty months. The defendants in

this case are directors of the company, and the object of the suit is to hold them personally liable for losses sustained by the association and its stockholders. Negligence of the directors is the ground upon which personal liability is attempted to be fastened upon them.

It is charged that the management of the affairs of the association by the directors was "marked by wilful disregard of the interests intrusted to their care, and by reckless and culpable extravagance and negligence, whereby the said board of directors misapplied, wasted and squandered the funds and assets of said association;" that investments of the funds of the association were lost because they were to a great extent made "negligently and imprudently by said board upon inadequate security;" that the directors suffered the funds and property of the association "to be lost and wasted by gross negligence and inattention to the duties of their trust;" that they "acted negligently, recklessly, wastefully and culpably in the management of the affairs of said corporation, whereby it sustained the almost complete loss of its funds and property, and was rendered insolvent." George W. Miller and Elmer C. Wachter were the only defendants who answered the bill. Their answers denied all the charges of negligence, recklessness and extravagance, etc., charged against them, and averred that they had acted in good faith and did all they could for the best interest of the association. Testimony was taken by the appellants, and the bill, after argument, was dismissed by the lower Court.

There can be no doubt that the defendants as directors of the insolvent association would be personally liable in this suit for losses sustained, if the allegations of gross or culpable negligence charged in the bill are proved. This Court has defined the duty of directors, and has stated the circumstances under which they are personally liable for losses sustained by the corporation in consequence of their negligence. It may be said that the rules to be applied to this class of suits have been definitely settled in this State. *Booth v. Robinson*, 55 Md. 420; *Reus Loan Company v. Conrad*, 101

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Md. 224; *Emerson v. Gaither*, 103 Md. 564; *Fisher v. Parr*, 92 Md. 245; *Murphy v. Penniman*, 105 Md. 452; *Thomas v. Penniman*, 105 Md. 475.

In *Booth v. Robinson*, *supra*, the Court adopted the doctrine announced in *Overrend v. Gibb*, 5 H. L. 480, that "facts which may show imprudence in the exercise of powers clearly conferred upon directors will not subject them to personal responsibility; but if the imprudence be so great and manifest as to amount to *crassa negligentia*, and consequently to a breach of trust, personal responsibility will be incurred. Indeed all the cases agree that directors are not liable for the consequences of unwise or indiscreet management, if their conduct is entirely due to mere default, or mistake of judgment, but the *onus* of proof of fraud, combination, or gross negligence to render the directors personally liable is upon the party making the charge; and the proof must be clear and manifest."

The real contention between the parties is as to the effect of the evidence. Does it show that Miller and Wachter were guilty of such gross negligence as to render them personally liable for the losses sustained by the association? We have carefully read and considered the evidence, and our conclusion is that it does not support the charges of negligence contained in the bill. There is no fraud charged, and it is not claimed that there was any misappropriation of any of the funds of the association. The evidence shows that Miller and Wachter, against whom the suit is really directed, were acting in entirely good faith, and were pursuing a course which they believed would result in the ultimate success of the association. The directors had subscribed for and paid in about six thousand dollars for stock. Miller and Wachter seemed never to have doubted that the association would be successful, and only a short while before it went into the hands of receivers, they loaned it substantial sums, which have never been repaid. They paid in more money than they received in salary. The only evidence in the case tending to show bad faith are certain false statements contained in let-

ters and printed matter sent out by the secretary apparently for the purpose of securing further stock subscription; but neither Miller nor Wachter appear to have known of these statements, nor does it appear that these representations in any way contributed to the losses sought to be recovered. Every dollar of the money paid in or stock subscriptions and otherwise has been accounted for, the books were correctly kept, and showed to whom and for what purposes the money was paid.

This association was very ambitious in its projects. It was proposed to make it an interstate association; to establish local branches in different States, and it did establish local branches, and did transact business in several States. It was authorized to do a building and loan association business; to loan money on chattels, notes and other security; to engage in the trust, deposit and storage business; to receive money on special deposit, and to issue trust, deposit and storage stock. These things seemed very attractive to the gentlemen interested in the company. They believed it would be favorably received by the public in the large field in which it was proposed to operate, and that they would have no difficulty in establishing and extending it. Its brief career furnishes another example of disappointed expectations. The thing went to pieces, and the stockholders lost their money. This has happened many times to other enterprises which appeared most attractive, and full of promises of handsome returns on the money invested. Such a result is usually followed by charges of mismanagement, recklessness and negligence, and often by suits by the unfortunate stockholder to recover his money.

The record shows that the money was really lost in the effort made by the directors to establish the business of the company. The policy adopted for the development of the association, in the light of subsequent events, may be said to have been unwise; but the plan or method that should be adopted and pursued was a matter to be determined by the

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directors, and it does not follow that merely because the company failed that they can be held personally responsible.

Mr. Miller, the president, appears to have been an honest and honorable man, but inexperienced in the business in which the association was engaged, and this want of experience, and mistake in judgment as to the proper course to be pursued were really the causes of the failure of the company, although it is entirely problematical whether such an institution could have succeeded under the most efficient management.

When the acts of the appellees are considered in the light of the situation and conditions in which they were placed, while it may be said they were unwise, indiscreet and inefficient in the management of the association, and were guilty of some negligence, we do not find that they were guilty of *such gross or culpable negligence*, which must clearly be shown, before they can be held to be personally liable.

The order appealed from will, therefore, be affirmed.

Order affirmed with costs.

J. FRANK WEANT vs. THE SOUTHERN TRUST AND DEPOSIT COMPANY.

Rights of Holder in Due Course of Accommodation Check—Interest—Explanation by Trial Court of Instruction—Right of Holder Against Drawer of Check Who Stopped Payment.

One who discounts a note or a check in due course, without actual knowledge of any fraud or defect invalidating the same in the hands of the payee, is entitled to enforce payment against the maker, although he executed the note or check without consideration and for the accommodation of the payee.

When a plaintiff is entitled to a sum of money with interest thereon from a certain date, the verdict of the jury should be for the total of the principal sum with interest added to the day of trial, and not for the principal sum with interest.

The trial Court has the right at any time to explain to the jury the legal effect of instructions granted.

The defendant gave to one P. his check on a bank for a certain amount for P.'s accommodation. P. deposited the check in his account with the plaintiff bank, received credit therefor and drew out the whole amount. On the day he gave the check, defendant notified his bank on which it was drawn not to pay it, and the plaintiff was therefore obliged to take it up. Afterwards P. gave to the plaintiff promissory notes for the amount of the check, which plaintiff agreed to receive as security upon condition that defendant endorse the same. Defendant refused to endorse the notes, and they were not paid by the maker. *Held*, that the plaintiff is entitled to recover from the defendant the amount of the check with interest from the date thereof less a certain sum which P. had paid on account.

Decided February 4th, 1910.

Appeal from the Superior Court of Baltimore City (NILES, J.).

Plaintiff's 3rd Prayer.—That there is no evidence in this case legally sufficient to show that the Southern Trust and Deposit Company had actual knowledge of any infirmity or defect in the check sued upon, or any knowledge of such facts that its action in taking said check amounted to bad faith. (*Granted.*)

Plaintiff's 5th Prayer.—If the jury shall find from the evidence in this case that the defendant drew the check on the First National Bank for eight hundred and twenty-five dollars (\$825), to the order of S. W. Peck, offered in evidence; that the said S. W. Peck endorsed the same in blank and deposited it in his account with the Southern Trust and De-

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posit Company; that said company thereupon placed the amount thereof to the credit of said Peck on his said account; that said Peck afterwards withdrew from his said account with said company the whole amount of said check; and that the defendant notified the said First National Bank to stop payment on said check; and said check was presented for payment to said bank and payment was refused and has never been made; and shall further find from the evidence that after payment was so refused the said Peck delivered to said Southern Trust and Deposit Company two promissory notes, for four hundred dollars (\$400) and four hundred and twenty-five dollars (\$425), respectively, drawn by said Peck and Mary O. Peck, his wife, to the order of the defendant, upon the condition that the defendant was to endorse said notes, and the said Southern Trust and Deposit Company was to hold them as security for the payment of said check, and credit the respective amount of said notes, when paid, upon the amount due upon said check; and shall further find from the evidence that the defendant refused to endorse said notes and that subsequently said Peck paid up the sum of eighty-five dollars and fifty-six cents (\$85.56) on account of said check, and gave the said Southern Trust and Deposit Company a promissory note for three hundred and thirty-nine dollars and forty-four cents (\$339.44) drawn by said Peck and Mary O. Peck, his wife, to the order of said Peck, and by them endorsed in blank, in renewal of said note for four hundred and twenty-five dollars (\$425), upon the condition that the defendant was to endorse said renewal note, and said company was to hold the same, with said note for four hundred dollars (\$400), as security for the payment of said check, and credit the respective amounts of said notes, when paid, upon the amount due upon said check; and shall further find that the defendant refused to endorse said note for three hundred and thirty-nine dollars and forty-four cents (\$339.44), and that none of said notes has ever been paid,—then the plaintiff is entitled to recover the full amount of

said check with interest thereon from the date thereof, less said sum of eighty-five dollars and fifty-six cents (\$85.56) with interest thereon from the date of said note for three hundred and thirty-nine dollars and forty-four cents (\$339.44). (*Granted.*)

The Court read this prayer to the jury, and after reading it said: "And I say to you, you should make a calculation and find the interest and add it to the whole amount, instead of making the verdict for a certain amount and interest. You make all the calculations."

Defendant's 1st Prayer.—If the jury shall find from the evidence that the defendant, on the 13th day of January, 1906, gave to S. W. Peck, a check on the First National Bank for the sum of \$825 without consideration, and that before the said check was paid the defendant stopped payment and that thereafter on January 16, 1906, the said Stephen W. Peck and Mary O. Peck, his wife, gave two notes, payable to the defendant for \$400 and \$425 respectively, and that the defendant refused to endorse said notes to the plaintiff and that thereafter the said Stephen W. Peck and Mary O. Peck, his wife, gave other notes for said indebtedness of the defendant of \$825.00 and that the Southern Trust and Deposit Company accepted said notes and released the defendant from liability, then their verdict should be for the defendant. (*Refused.*)

After counsel had argued the case to the jury, the Court of its own motion offered and granted the following instruction:

In view of what has been said in argument, the Court informs you that there can be but one recovery by the receivers of the Southern Trust and Deposit Company for the amount of the check offered in evidence. Whatever may be paid by Mr. Peck to the receivers on account of this check must be credited to the amount of the judgment in this case, if one is rendered, and if as between the defendant and S. W. Peck, Peck is primarily liable, the defendant may recover against Peck any amount which defendant may pay on account of such check.

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The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and UERNER, JJ.

O. Parker Baker and *Geo. E. Robinson*, for the appellant, submitted the cause on their brief.

William S. Bryan, Jr., (with whom was *Mason P. Morfit* and *Wm. Pinkney Whyte, Jr.*, on the brief), for the appellee.

PEARCE, J., delivered the opinion of the Court.

On January 13th, 1906, the appellant, J. Frank Weant, gave to Stephen W. Peck his check for \$825.00 on the First Nat. Bank of Baltimore and the latter on the same day deposited this check to his own credit with the appellee, the Southern Trust and Deposit Company where he kept his account. On the same day, the appellant, by a written order to the First Nat. Bank, stopped payment of this check, which was presented for payment at said bank in the regular course of business, and was returned, unpaid, to the appellee by the runner of the Nat. Bank of Commerce through which the appellee cleared, and marked "payment stopped." The appellee paid the amount of the check to the runner of the Nat. Bank of Commerce, and took up the check which thereafter remained in its possession, and has never been paid, except that a credit of \$85.56 has been given for several small sums on account. On May 25th, 1908, the appellee went into the hands of receivers, under an order of Circuit Court No. 2 of Baltimore City which gave authority to the appellee to maintain this suit which was instituted June 29th, 1908.

The declaration contained the common counts, and a special count on the check setting forth the stoppage of payment as the reason for its non-payment. There were five pleas filed. The first and second were the general issue; the third was payment; the fourth was a release upon the check in consideration of the giving of certain notes for the amount of said check by said Peck and his wife, upon which notes the

plea alleged the full amount of said check had been collected by the appellee; and the fifth, that the check was given by the appellant without consideration and was procured by fraud and misrepresentation by the plaintiff and payee, known to the plaintiff before the endorsement of the check to it, and issue was properly joined on all these pleas, the verdict being for the plaintiff for \$873.17 on April 7th, 1909. Mr. Taylor, the paying and receiving teller of the appellee, testified to the signature of the appellant on the check and of Peck as endorser, and to its deposit on January 13th, 1906, by Peck to his credit; also that concurrently with its deposit, Peck withdrew the larger part of that deposit, and the whole balance of the account was drawn out on other checks, and that this check had never been paid.

It was proved by Mr. Wilcox, secretary and treasurer of the appellee, that when the check was returned unpaid he telephoned Peck about it who came the same day, and said he would see the appellant about it; and that he then and there wrote a waiver of protest upon the check, which Peck signed, and that on the next day, or the day after that, two notes were executed by Peck and wife to the order of the appellant, both dated January 16th, 1906, one for \$425 at two months, and one for \$400 at four months, and were delivered to him, and that he received them from Peck with the understanding between them that the appellant would endorse them, and with directions from his board of directors, that if, and when, so endorsed, they should be accepted in lieu of the check, but that the appellant refused to endorse them, and they were never accepted in lieu of the check. He also testified that the directors were anxious to avoid suit against the appellant, as he was very vindictive and was talking abusively about the bank, and that suit was delayed in the hope that Peck would be able to arrange the matter without suit. When the two months note matured on March 16th, 1906, a new note was made by Peck and wife to his order for \$339.44, being for the difference between the original note for \$425 and the \$85.56 paid by Peck, and the original \$425 note was

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stamped "replaced by new note;" that the understanding with Peck was that this note should not be accepted until indorsed by the appellant, and that it never was so indorsed, and was never accepted as part payment of the check. There was some confusion arising out of the assumption by the appellant that two new notes were executed on March 16th, but it is abundantly clear from all the evidence that the only new note executed was the one for \$339.44 payable four months after date.

Peck testified "that when he deposited the check with the appellee he drew some of that money but could not tell how much," it varied from \$100 to \$200 or \$300, and that "he took the money he withdrew that day to the appellant." It is not clear from his testimony whether there was any consideration for the check but we shall treat it as given for Peck's accommodation. He testified that he and his wife executed the two notes of January 16th, 1906, and "that Mr. Wilcox's view of it was that they were to have been indorsed by the appellant," and that "he intended Mr. Weant to indorse them," and asked him to do so, but he refused. He could not give any definite statement as to the execution of any renewal notes, but he identified the note of \$339.44 as signed by himself and wife, but that "he could not recognize at all what it was for, or deliberately connect it with that transaction." This was all the plaintiff's testimony.

The appellant testified in his own behalf that Peck had been getting a check from him almost every day for some time, three or four months; that he owed Peck nothing on January 13th and received no consideration for the check of that date; that the payment made by Peck to him that day "was possibly money on account of the previous check," and that he stopped payment of that check of the 13th because the thing had been going on so long, and that Wilcox knew that these checks were being deposited during all that period and told him he was satisfied this particular check was an accommodation check, but this was after the deposit of the check; that

Wilcox wanted him to endorse the notes of January 16th and he refused, and that he had several telephone talks with Wilcox "who wanted to make him fix up that check, and told him if he would indorse the notes of January 16th he would release him on the check." He also said that Wilcox told him in reference to the notes or note of March 16th, that if he would indorse them it would release him on the check, but on cross-examination he said he was not asked by Wilcox to indorse any second notes, and that he had never stopped payment of any check before. He also said that sometime in March Wilcox talked with him over the telephone "in regard to a set of notes that had been given by Peck and his wife, or rather made to S. W. Peck and indorsed by them and that it released me. *I so understood it.*"

This closed the defendant's testimony, whereupon the plaintiff offered five prayers, of which the third and fifth were granted and the others were refused, and the defendant offered one which was refused. After reading to the jury the plaintiff's fifth prayer, the Court gave a verbal direction to the jury, in explanation of the reference in the prayer to the allowance of interest, and after the argument of the case, by reason of something said in the argument the Court, upon its own motion, gave an additional instruction, designated "Court's Instruction," all of which will be set out in the report of the case. The only exception is to the ruling on the prayers offered and to the Court's own instructions.

The plaintiff's third prayer was framed to meet the issue joined on the fifth plea which alleged want of consideration for the check, and fraud and misrepresentation by the plaintiff and payee in procuring it, which was known to the plaintiff before the check was indorsed to it, and the prayer was carefully drawn with reference to the provisions of the Negotiable Instrument Act, to challenge the legal sufficiency of the evidence to sustain that defence.

The plea apparently relies upon want of consideration, and fraud and misrepresentation in procurement of the check, as *separate* valid defences.

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Section 48 of Article 13 defines an accommodation party as "one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person." And the section further declares that "such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party." The mere fact therefore that this note was an accommodation note, would not constitute a defense against a holder in due course, and section 78 declares that "every holder is deemed *prima facie* to be a holder in due course." Section 71 defines a holder in due course: (1) The instrument must be complete and regular on its face. (2) He must have taken it before it was overdue, and without notice of previous dishonor, if so dishonored. (3) It must have been taken in good faith and for value. (4) At the time he took it he must have been without notice of any infirmity in the instrument, or defect in the title of the person negotiating it.

Section 75 of Article 13 provides that: "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had *actual knowledge* of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." Section 76 provides that "a holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment for the full amount thereof against all parties liable thereon."

This check is complete and regular on its face; it was negotiated to the appellee for value the same day it was issued; there is no evidence of any previous dishonor, nor of any infirmity in Peck's title to the check, nor of knowledge by the appellee of any such facts that its taking of the check amounted to bad faith.

The appellant testified that he had been giving similar checks to Peck, that is, "*lending him his name*," for a long period before, and that he had never stopped payment of any check before, and that he had no communication with the appellee until after the check had been returned to the appellee marked "payment stopped." Nor is there a particle of evidence of any fraud or misrepresentation on the part of Peck in procuring the check, or of any defect in his title, or restriction upon its use, or of any knowledge on the part of the appellee of any fact connected with the making and delivery of the check by the appellant to Peck. On the contrary, the fact that the appellant had been freely lending his name to Peck upon similar checks, which were deposited with the appellee and made the basis of credit to him, is evidence of the strongest character to show good faith on the part of the appellee in taking this check.

There was no error in granting this prayer.

The plaintiff's fifth prayer is assailed as misleading because it is alleged that it leaves out of question the contention of the defendant that new notes were given in place of the check, thereby creating an obligation on the part of Peck and relieving the defendant of liability on account of the check. It is difficult to understand this contention in face of the fact that the prayer deals fully with the execution and delivery of these new notes and all the circumstances attending that feature of the case. The theory of the prayer as respects the effect of these notes, is that they could not defeat the plaintiff's right to recover, provided they were given and received as security for said check, and not in payment therefor, and provided that neither the check nor the notes have been paid. It required the jury to find that the acceptance of these notes by the appellee in the place of this check was upon the express condition that they should be indorsed by the appellant so as to preserve his liability for the debt, and that they were never indorsed by him, and have never been paid by anyone, and there could be no more effective method of negotiating their acceptance in payment of the check. We

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can perceive nothing whatever in this prayer tending to mislead the jury as to any possible effect of these notes. The first two notes, which were made payable to the appellant, would have been utterly worthless in the hands of the appellee without his indorsement, and this well illustrates the futility of the defence set up.

This prayer is also assailed because it did not leave the allowance of interest on the check to the discretion of the jury, but we do not think this objection well founded. In *McShane v. Howard Bank*, 73 Md. 159, which was a suit upon a cashier's bond to recover for a defalcation, this Court, through JUDGE MCSHERRY, said: "Generally speaking, the rule is that interest should be left to the discretion of the jury; but this rule is not without exception, and among its exceptions are cases on bonds, or on contracts, to pay money on a day certain, and cases where the money has been used. Ridgaway improperly and unlawfully took and applied to his own use the money of the bank, and his obvious duty is to put the bank in the precise position it would have occupied if the money had not been taken and retained by him. * * * The whole sum and the interest on each item make up the true measure of damages against him for wrongfully taking and detaining or using the money of the bank." In that case it should be observed that the bond was not for payment of money upon a certain day but for the general performance of duty as cashier.

The same principle has been applied in numerous cases.

In *Parsons v. Utica Cement Co.*, 66 Atl. Rep. 1024, the suit was on coupon bonds payable on demand at a bank, but no funds were ever placed there. It was held no demand was necessary to recover interest from maturity on each bond and coupon.

In *Flynn v. American Banking Co.*, 69 Atl. Rep. 771, it was held that where the directors of a corporation vote to stop payment on its liabilities, or its assets are sequestered by a decree of Court, no demand is necessary to entitle a creditor to interest for delay in payment.

And in *Chemical Nat. Bank v. Bailey*, 5 Fed. Cases No. 2635, JUDGE WALLACE said: "If the bank by words or conduct denies the depositor's right to his balance it becomes presently liable to an action without formal demand, and interest is recoverable as damages."

The same rule was laid down in *In re East of England Banking Company*, 6 L. R. Eq. Cases, 368 by VICE-CHANCELLOR MALINS, who said: "Where a promissory note is made payable on demand and the maker of the note publicly announces that he has stopped payment" no demand is required in order to recover interest.

The proof in this case is that the stop-payment order was given January 13th, 1906, and received by the teller of the bank that day, and the prayer required the jury to find that payment was stopped, and therefore interest is recoverable from the date of the order whether the check was then presented or not. Even if it could be shown that interest should have been allowed only from January 16th instead of 13th, the difference would be 25½ cents, and it would be a reproach to the administration of justice to reverse this judgment for so trifling an error in computation merely.

The Court's verbal instruction after reading the plaintiffs' fifth prayer to the jury is not inconsistent, as contended by the appellant, with the proposition asked for by the prayer. It does not change in any manner the rule or measure of recovery laid down in the written prayer. Its obvious purpose was to guard the jury *if their verdict should be based upon that prayer*, against the not uncommon error of finding for a principal sum with interest, instead of calculating and adding the interest to the principal sum. We must credit the jury with a reasonable degree of intelligence, and it is not reasonable to suppose that anyone could have understood this explanation of the rule as to interest, as a direction to find a verdict for the plaintiff, or even as reflecting the opinion of the Court upon the merits of the case. In *Hussey v. Ryan*, 64 Md. 433, it was said: "Such an interposition of the Court is often salutary and promotive of a clear under-

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standing of the law of the case, especially if its rulings are not clearly understood, or, as sometimes occurs, are contravened or misconstrued in the argument to the jury." Moreover in the written instruction of the Court, given after the argument, the Court expressly stated that "whatever may be paid by Mr. Peck to the receivers on account of this check must be credited to the amount of the judgment in this case, *if one is rendered.*" Thus, whatever inadvertence there may have been supposed to be, in not guarding the previous verbal explanation or instruction, by similar careful language was cured by the last written word of the Court given to the jury as they retired, and carried with them into their room. This instruction will be considered later in its regular order.

The defendant's prayer was properly refused for several reasons. It was misleading. It was well calculated to lead the jury to believe that want of consideration for the check was a material matter in the case, whereas, as we have shown that was wholly immaterial.

It is confused, and misleading in another respect also, in assuming that the check was paid at sometime, when there is not a particle of evidence that it was ever paid; and also in inducing the jury to believe that the stoppage of payment was a valid defence although payment was stopped after the check was deposited and passed to the credit of Peck, and without any evidence that the appellee knew of such stoppage when the deposit was made and the credit given. Moreover there was no evidence legally sufficient to show that the appellee accepted said notes and released the defendant from liability on the check, and if there had been such testimony, the prayer would still have been erroneous in failing to require the jury to find the facts necessary to constitute a legal release, and thus leaving to the jury a question of law. So without further considering other defects in the prayer, as argued by the appellee, we are of opinion it was correctly refused.

This brings us to the Court's written instruction given after the conclusion of the argument before the jury.

It appears from the language of this instruction that something had been said in the course of the argument which the Court deemed, required, or made it appropriate, that the Court should explain the effect of the instructions granted at the instance of the plaintiff, though the record does not disclose what had been said. We must assume that the Court exercised proper discretion in thus interposing, and the case, in this respect, is thus brought within the ruling in *Hussey v. Ryan*, *supra*, as a salutary interposition.

In *Poe's Practice*, sec. 308A, it is said: "It (the Court) has the right at any time during the trial to withdraw absolutely any instruction given to the jury, or to qualify or modify it at its discretion, if, upon reflection such course be deemed proper." And in *B. & O. R. R. v. Boyd*, 67 Md. 43, JUDGE ALVEY said that when the attention of the Court is called, at any stage of the trial to any alleged ambiguity, or claim that instructions already granted are susceptible of different interpretations, "it at once becomes the *duty* of the Court to remove the ambiguity and to make the meaning of the Court plain."

It is manifest that in the argument something had been said about payments that *might be* made by Peck to the receivers on account of *this check*, and this additional instruction of the Court was designed, as in *Downey v. Forrester*, 35 Md. 122, as explanatory of the plaintiff's fifth prayer, and removing any question which had evidently been intimated in argument as to a double recovery upon the check.

The reference in this instruction to the suit as one by the *receivers* of the appellee, is a mere verbal inaccuracy and of no importance whatever, it being impossible that this could in any manner mislead the jury or affect their verdict.

Finding no error in the rulings the judgment will be affirmed.

Judgment affirmed with costs to the appellee above and below.

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THE OWNERS' REALTY COMPANY vs. THE
MAYOR AND CITY COUNCIL OF BAL-
TIMORE ET AL.

*Assessment Against Abutting Owner for Paving Private Alley
to Abate Nuisance—Validity of Municipal Ordinance—
Right of Appeal to City Court Precluding
Resort to Equity.*

Ordinance No. 13 of Baltimore City, passed in October, 1905, provides that when a nuisance dangerous to health shall exist in any private street or alley, the City Engineer, acting upon a certificate of the Commissioner of Health, shall pave or repave the street or alley, and the cost thereof shall be collected from the owners of property fronting on the street. The ordinance also provides that before proceeding to pave, the City Engineer shall give ten days' notice by advertisement that he will ascertain the amount to be assessed and give an opportunity to those interested to show cause why the paving should not be done. It is also provided by ordinance that when the assessment has been made, the City Register shall give notice by advertisement that the assessments have been filed in his office and that the parties affected may appeal to the Baltimore City Court. In September, 1906, the Commissioner of Health notified the City Engineer that a nuisance existed in an alley (vacant land fronting on which was owned by the plaintiff), and that it was necessary to grade and pave the same in order to prevent the accumulation there of stagnant water. The city officials determined that it was necessary to construct a sewer before paving and the work of paving was therefore not done until December, 1907. In March, 1907, notice as to the paving required by said ordinance was given and the assessments were made and transmitted to the City Register. The Register published notice that the assessment for paving in the alley in question, together with assessments in several other streets, had been made, and notified persons interested of their right

to appeal to the City Court within thirty days. Plaintiff filed the bill in equity in this case alleging that the assessment against it was *ultra vires*; that the ordinance of 1905 was void because unreasonable; that the notice published by the City Register was defective, and prayed that the collection of the assessments be enjoined. *Held*, that it was not necessary for the city officials to await the construction of the sewer before determining that a nuisance existed in the alley, which would not be abated by the sewer, but that a paving of the alley would be necessary.

Held, further, that the ordinance of 1905, is a valid exercise of the power delegated to the city.

Held, further, that whether the notice of the assessment against the plaintiff as published by the City Register was sufficiently definite in its description of the location of the alley to be paved or not, it was such notice as entitled the plaintiff to appeal to the City Court against the assessment, and since that remedy was given to him by statute, he is not entitled to resort to a Court of Equity.

Decided February 2nd, 1910.

Appeal from the Circuit Court No. 2 of Baltimore City (GORTER, J.).

The cause was argued before BOYD, C. J., PEARCE, SCHMUCKER, BURKE, THOMAS and PATTISON, JJ.

John J. Hurst and *David M. Newbold, Jr.*, for the appellant.

Albert C. Ritchie, Assistant City Solicitor (with whom was *Edgar Allan Poe*, City Solicitor, on the brief), for the appellee.

PATTISON, J., delivered the opinion of the Court.

This is an appeal from a decree of the Circuit Court No 2 of Baltimore City, dismissing the bill of the appellant, in

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which it is sought to restrain the City of Baltimore from collecting a paving assessment against the property of the appellant, abutting upon a private alley in the City of Baltimore.

The assessment was made under and by authority of an ordinance of the Mayor and City Council of Baltimore, known as Ordinance No. 13, approved October 23rd, 1905, and passed pursuant to sections 486 to 492, inclusive, of the City Charter.

This assessment was placed in the hands of the City Collector, for collection, and the plaintiff was notified, that if the assessment was not paid within the time named in the notice, that the Collector would thereafter proceed to advertise for sale the property of the appellant for the payment of the assessment.

The plaintiff alleged in its bill that it would be highly inequitable and unjust, as well as illegal, for the defendant, to sell its property for the payment of the alleged assessment, and among other things prayed that the defendant, be restrained from further proceeding to sell its property for the payment of such assessment or any part thereof.

The ordinance referred to, in the first section thereof, provides: "That whenever any nuisance dangerous to the health of the inhabitants of Baltimore City shall exist in any private street, lane or alley of the City of Baltimore, and it shall be considered necessary, in the opinion of the Commissioner of Health, in order to remove the same, to have such street, lane or alley paved or repaved, the said Commissioner of Health shall issue a certificate to that effect to the City Engineer, who shall thereupon proceed to pave or re-pave the same; and the amount expended in paving or repaving the same and the expenses of collection shall be recovered from the owner or owners of the property fronting thereon in proportion to the amount expended in front of said property, by suit against the owner or otherwise, as provided by this ordinance."

And by the succeeding section of this ordinance the city engineer is directed before proceeding to pave or repave any such street, lane or alley, to give ten days' notice in two newspapers published in the City of Baltimore, that on the day and at the place therein named, he will proceed to ascertain and determine the amount to be assessed upon all the property binding on said street, lane or alley, and that at such time and place an opportunity will be given to all persons interested to show cause, if any they have, why said street, lane or alley shall not be paved; and it is, in the ordinance, further provided, that thereafter all the proceedings in connection with the paving of such street, lane or alley, shall be those set forth in certain sections, therein named, of Article 48 of the Baltimore City Code.

The appellant contends:

1st. That the acts of the city officials in paving the alley and assessing the appellant's property therefor, under the circumstances, were *ultra vires* and void.

2nd. That if it be considered that the acts of the city officials in paving the alley, under the facts shown in the record, were within the provisions of Ordinance No. 13, and not *ultra vires*, that the said ordinance is void, being unreasonable.

3rd. That the advertised notice of the city register was not merely incomplete and defective, but so far as (the plaintiff) and its property was concerned, was no notice whatever, and that such total failure of notice renders the acts of the city officials, under the circumstances, *coram non judice* and void.

The evidence in this case, which consists exclusively of the testimony of the defendant, the plaintiff having declined to offer any testimony in support of the allegation of the bill, discloses, that the appellant company is the owner of a lot of land in the City of Baltimore, situated on the east side of a private alley located between Thomas avenue on the west and Warwick avenue on the east, that this lot of land at the time of the trial of the case in the lower Court, was vacant and unimproved, except for a few dwelling houses then in

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the course of construction. That in September, 1906, and prior thereto, the kitchen and waste water from the houses fronting on Thomas avenue, drained into the alley, and it not being properly graded or paved, and the surface thereof beng irregular, with ruts, holes and depressions therein, the water could not run off, but accumulated in the alley, where it remained, and became stagnant and offensive. That while the alley was in this condition, in September, 1906, an investigation of its condition was instituted by the Health Department of the city, which resulted in the Commissioner of Health reaching the conclusion that, the condition there found existing in the alley, was a nuisance dangerous to the health of the inhabitants of the city, and that in order to remove the nuisance, it was necessary, in his opinion, to grade and pave the alley. Notices were sent to the property owners on the alley, calling their attention to its condition, and asking them to abate the nuisance, by grading and paving the alley. Some of them paved, while others did not, whereupon the Commissioner of Health on the 14th day of September, 1906, issued to the city engineer of Baltimore, the following certificate: "I hereby certify that a nuisance, dangerous to the health of the inhabitants of Baltimore City, exists in an alley known as rear 1701 Thomas avenue, and that in my opinion it is necessary, in order to remove the same, to grade and pave said alley in accordance with Ordinance No. 13, of the Mayor and City Council of Baltimore, approved October 23rd, 1905." Upon the receipt of this certificate, the city engineer, with other city officials, investigated the condition of the alley and found the nuisance therein existing, and determined that in order to abate it, that it was not only necessary to grade and pave the alley, but that it was also necessary to build a sewer in the bed of the alley, to take off the water that in times of heavy rains and storms flowed into the alley from points to the northward of it, for without this sewer, this large quantity of water flowing over the surface of the alley would undermine the pavement when laid. So

having decided that the sewer was necessary, it was then determined to build it before laying the pavement. Accordingly the city engineer proceeded to obtain from the land owners abutting on the alley, the rights of way necessary for building the sewer. Months were consumed in obtaining these rights of way, the last of which was not obtained until the spring or summer of 1907. The sewer was then built at the expense of the city, being completed in December, 1907, at which time, the evidence discloses the nuisance still existed. After the sewer was completed, in fact before it was fully finished, the pavement was commenced, and was finished in a few weeks thereafter, in the latter part of Dec., 1907. While the city was obtaining the rights of way for the sewer, the city engineer was ascertaining the amount to be assessed against each of the properties fronting on the alley, and on the 18th day of March, 1907, inserted in two newspapers published in the City of Baltimore, a notice required to be given by section 2 of Ordinance No. 13, in which was included a number of other private streets and alleys to be paved. In this notice he located this nuisance as being in the "alley in the rear of the 1701 block Thomas avenue" and therein notified the owners of property abutting on said alley, that he had apportioned the costs of grading and paving the alley, and that the papers were on file in his office, and that on April 1st, 1907, he would be at his office between the hours of 12 M. and 2 P. M. "to consider any statement, written or verbal, which interested parties may desire to present." No one appearing or responding to said notice, on or before the day mentioned therein, he, on the following day, transmitted these assessments to the city register. Upon the receipt of them, the city register, on the 2nd day of April, 1907, inserted in each of three newspapers published in the City of Baltimore, "The Sun," "The German Correspondent" and "The World" the notice required to be given by section 61E of Article 48 of the Baltimore City Code, which section is incorporated in Ordinance No. 13 informing all persons interested that such assessment had been deposited in his office and notifying

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them of their right of appeal to the Baltimore City Court, at any time within thirty days from the date of the notice. In this notice the alley to be paved is described as "alley rear of 1701 Thomas avenue." It is in evidence that the land lying immediately across the alley from rear of 1701 Thomas avenue, is the land of the plaintiff against which the assessment was levied, although such land of the plaintiff extends far beyond the rear of the lot 1701 Thomas avenue.

The appellant in his brief recognizes the "right of the city to pave the alley attached because of the existence of the nuisance and that the duration of that right coincided with the continued existence of the nuisance," but contended that the acts of the city officials in proceeding under the ordinance, to abate the nuisance, by paving the alley before ascertaining what effect, if any, the building of the sewer would have upon the nuisance, were *ultra vires*, and that the question whether or not a nuisance existed in the alley was one to be determined after the work on the sewer had been completed, and not before.

The existence of a nuisance in the alley dangerous to the health of the inhabitants of the city, at the time of the institution of these proceedings, as well as at the time of the completion of the sewer, is clearly established by the evidence. The cause of this nuisance was the accumulation, in the holes and depressions in the alley, of kitchen and waste water, flowing from the adjacent houses and rain and storm water flowing into the alley from points to the northward of it. Paving the alley would rid it of the holes and depressions therein and permit the water from the adjacent houses to flow freely over its surface, without accumulating therein, but with the rain and storm water still flowing into the alley in great quantities, the pavement when laid would be undermined and destroyed by it; therefore, to provide for the rain and storm water, it was necessary to construct a sewer under the bed of the alley. Little, if any, of the actual work upon the sewer and the pavement could be done at one and the same time. The work upon one had to precede the work upon

the other, and the officials wisely concluded to build the sewer before laying the pavement. If the pavement was first laid in this alley, nine and one-half feet in width, much of it would have to be disturbed and removed in building the sewer thereafter. While the actual work upon the sewer and the pavement could not be prosecuted at the same time, yet certain arrangements and preliminary work, relative to each, could be attended to and looked after at one and the same time, and by so doing the whole of the work could be more expeditiously disposed of. With this end in view, the city engineer while engaged in obtaining the rights of way for building the sewer, was at the same time ascertaining the amounts of the assessments for the paving of the alley properly chargeable against the properties abutting thereon, and when the sewer was completed the city officials were in a position to proceed at once, with the laying of the pavement. Whereas had they waited the completion of the work upon the sewer, before taking up the preliminary work upon the pavement, months probably would have intervened before this nuisance dangerous to the health of the inhabitants of the city could have been abated. The construction of the sewer was merely incidental to the work of abating the nuisance by laying the pavement. It was built for the purposes heretofore stated and was not intended to abate the nuisance. The evidence discloses that the nuisance existed before the sewer was built, and that it existed after it was built. The city officials knowing that the sewer could and would not abate the nuisance, why should they await its completion before passing upon the existence *rel non* of the nuisance? The continued existence of the nuisance imperiled the health of the inhabitants of the city, and it was the duty of the officials to act with diligence in abating it.

In *Harrison v. Mayor & C. C. of Baltimore*, 1 Gill, 277, this Court, speaking of the power of the Mayor and City Council of Baltimore, delegated unto them by the Legislature of this State, relative to the preservation of health and the removal of nuisances, said, that, "the transfer of this

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salutary and essential power is given in terms as explicit and comprehensive as could have been used for such a purpose. To accomplish, within the specified territorial limits, the objects enumerated, the corporate authorities were clothed with all the legislative powers which the General Assembly could have exerted. Of the degree of necessity for such municipal legislation, the Mayor and City Council of Baltimore were the exclusive judges."

We cannot agree with the appellant in its contention that these acts of the city officials complained of were *ultra vires*, nor was the ordinance void for unreasonableness, because it permitted these acts to be done under it. "The Court must judge in each case whether the exercise of the power be unreasonable. In assuming, however, the right to judge of the unreasonableness of an exercise of power, Courts will not look closely into mere matters of judgment when there may be a reasonable difference of opinion. It is not to be expected that every power will always be exercised with the highest discretion, and when it is plainly granted, a clear case should be made to authorize an interference upon the ground of unreasonableness." *The City of St. Louis v. Weber*, 44 Mo. 550.

We have now reached the objection urged by the appellant against the published notice of the City Register, notifying all parties interested of their right of appeal to the Baltimore City Court from the action of the city officials,—a right recognized by both the appellant and the appellee.

Section 61E of Ordinance No. 33, approved March 14th, 1893, incorporated in Ordinance No. 13, under which the notice of the engineer is required, provides that, "It shall be the duty of the City Register, within five days after the said proceedings shall have been deposited in his office, to notify all persons interested, by an advertisement to be inserted once a week for four successive weeks, in two daily newspapers of the city, that the said assessment and explanatory plat or plats have been so placed in his office and that

the parties affected thereby are entitled to appeal therefrom by petition in writing to the Baltimore City Court."

The city engineer pursuant to this section of the ordinance published the notice once a week for four successive weeks, in three daily newspapers published in Baltimore City, two printed in the English and one in the German language, notifying all parties interested of their right of appeal to the Baltimore City Court. The objection urged against the sufficiency of the notice is that it is deficient in its description of the location of the nuisance, and that in the notice was included a number of other private alleys and streets that were likewise to be paved under said ordinance.

In the case of *Wannenwetch v. The Mayor & C. C. of Baltimore*, 111 Md. 32, decided June 30th, 1909, the objection there made to the notices required to be published, was that they were not published in two newspapers printed in the English language. In that case JUDGE BURKE held that by the decision of this Court in the case of *Bennett v. Baltimore City*, 106 Md. 484, the notices were insufficient; but said that "while the case of *Bennett v. Baltimore City*, *supra*, settled the insufficiency of the notices to which we have referred, it does not determine the jurisdiction of a Court of Equity to entertain this bill, because in that case there was no tribunal other than a Court of Equity to which the taxpayer could appeal for redress. Where a special and limited tribunal acts within its jurisdiction, and an appeal is provided by the statute to another tribunal in which their action may be reviewed, mere errors, mistakes of judgment, or irregularities in their proceedings do not form a foundation for a bill in equity.

"In this case the commissioners confined themselves altogether within the limits of their jurisdiction, and the appellant was fully advised of his right of appeal. We therefore decide that having failed to avail himself of the appeal provided by law, for the redress of the wrong of which he complains, he is without remedy in a Court of Equity."

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Syllabus.

Without passing upon the sufficiency of the description of the location of the alley to be paved, we will say that we cannot adopt the contention of the appellant that the notice was no notice at all.

Having determined that the acts of the city officials complained of by the appellant are not *ultra vires* and that the ordinance is not void for unreasonableness, because it permitted these acts to be done under it, we therefore decide, in accordance with the decisions of this Court ending with the case of *Wannenwetsch v. The Mayor and City Council of Baltimore, supra*, that inasmuch as the appellant had the conceded right of appeal to the Baltimore City Court for the redress of the wrong, of which it complains, and of which right it failed to avail itself, it is without remedy in a Court of Equity. We will therefore affirm the order appealed from.

*Order affirmed, with costs to the appellee,
both above and below.*

NORTHERN CENTRAL RAILWAY COMPANY vs.
WILLIAM H. GREEN.

*Injury by Train to Horses Fastened in Trestle on Railway
Track—Sufficiency of Evidence of Negligence—Contribu-
tory Negligence of Those in Charge—Construction
of Code, Art. 23, sec. 287, Concerning Injuries
to Cattle by Railway Companies.*

Code, Art. 23, sec. 287, provides that railroad companies shall be responsible for injuries inflicted upon cattle, horses, etc., on their roads, unless said companies can prove that the injury was inflicted without any negligence on the part of the company or its agents. *Held*, that this statute applies to cattle, etc., estray on the railroad tracks or unattended, and does not apply to a case where horses become fastened in a trestle

on the private right of way of a railroad and the injury is inflicted by a railroad train while the servants of the owner are present endeavoring to release the animals. If these servants fail to act with promptness in flagging the approaching train, this is contributory negligence which prevents a recovery or damages for the injury.

The following hypothetical question was put to an expert locomotive engineer: "From the observation of the track which you made and your familiarity with the Westinghouse system of air brakes, what would you say as to the possibility of stopping a train, such as that described by W. in his testimony, within the space of 250 yards?" *Held*, that this question was not proper, since it omits any reference to the speed at which, according to the evidence, the train was moving when a signal of danger was first seen by the engineer, and the speed of a train is the most material factor in the inquiry within what space it can be stopped.

A pair of horses belonging to the plaintiff ran away and going upon the track of the defendant railway company became fastened in a trestle, their bodies resting on the crossties and their legs hanging below. When plaintiff's servants, from whom the horses had run away, came up to the trestle, they, with some other persons near by, endeavored, unsuccessfully, to extricate the horses. One of these persons presently went up the track to stop a train which they thought would be approaching around a curve. He met the train, which was running at the rate of twenty-five miles an hour, about 250 yards above the trestle and signalled to the engineer. The latter at once applied the emergency brakes, but the train ran on a short distance over the trestle, killing one of the horses and injuring the other. In an action against the railway company the evidence on the part of the defendant was that the train could not have been stopped before reaching the trestle after the engineer saw the signal or the danger, and there was no competent evidence on the part of the plaintiff that it could have been so stopped. *Held*, that the case should not have been submitted to the jury, since there was no evidence of any negligence on the part of the defendant in failing to use due care to avoid the injury after getting knowledge of the danger, and also because the plaintiff's servants in charge

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of the horses were guilty of contributory negligence in not promptly giving notice to the engineer of the train, so that he could have had time to stop it before reaching the trestle.

Decided February 2nd, 1910.

Appeal from the Circuit Court for Baltimore County
(VAN BIBBER, J.).

The prayers referred to in the opinion of the Court are as follows:

Plaintiff's 1st Prayer.—If the jury find from the evidence in this case that the two horses mentioned in the declaration, were the property of the plaintiff, and that at the time of the happening of the accident complained of said horses had escaped from the control of the plaintiff's servants or agents and had strayed on the defendant's railroad tracks, and that while on said tracks said horses attempted to cross a bridge or culvert on said railroad, and in doing so slipped and fell on said bridge or culvert in a position from which they were unable to extricate themselves, and that said horses were on said railroad, and in such position without any fault of the plaintiff, his servants or agents, and shall further find that the agents and servants of the plaintiff exercised such diligence and care as men of ordinary care and prudence would have exercised under like circumstances, to find said horses and to extricate them from such position, and that they were unable to do so before said horses were struck by the defendant's locomotive or cars if the jury find they were so struck, and shall further find that whilst on said tracks and in such position, the defendant's locomotive or train of cars struck said horses and killed one, and so badly injured the other as to render it worthless; and shall further find that the servants or agents of the defendant in charge of said locomotive or train of cars, failed to exercise in the management thereof, such care and caution as men of ordinary care and prudence would have exercised under like circumstance, and that said horses were struck as a direct result of such failure on their

part, then the plaintiff is entitled to recover in this action whatever sum they may find from the evidence said horses to have been fairly and reasonably worth, at the time they were so struck by defendant's train. (*Granted as modified.*)

Plaintiff's 2nd Prayer.—If the jury find from the evidence in this case, that the two horses referred to in the plaintiff's declaration were the property of the plaintiff, and that they were on the defendant's railroad track without any fault on the part of the plaintiff or his servants or agents, and that whilst so on said railroad tracks the engine or railroad cars of the defendant struck said horses and killed one and so badly injured the other that it was thereby rendered worthless, then the plaintiff is entitled to recover in this case such sum as the jury may find from the evidence to have been the fair and reasonable value of said horses at the time they were so struck by defendant's train, unless they further find that said horses were so struck as the result of unavoidable accident on the part of the defendant. (*Granted as modified.*)

Plaintiff's 3rd Prayer.—If the jury find from the evidence in the case that the horses mentioned in the declaration belonged to the plaintiff, and that they were on the defendant's railroad tracks at the bridge or culvert referred to in the evidence as "Bridge A" without any fault on the part of the plaintiff, his servants or agents, and that whilst so on said railroad tracks, one of said horses was killed and the other so badly injured as to be rendered worthless by a locomotive or train of cars passing over defendant's railroad; and shall further find that such striking of said horses could have been avoided by the use on the part of the defendant's agents and employees in charge of said train, of such care and caution as men of ordinary care and caution would have exercised under like circumstances, then the plaintiff is entitled to recover whatever sum the jury may find from the evidence to have been the fair and reasonable value of said horses, at the time they were so struck by defendant's train. (*Granted as modified.*)

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Defendant's 1st Prayer.—The defendant prays the Court to instruct the jury as matter of law, that under the pleadings in this case, there is no evidence legally sufficient to entitle the plaintiff to recover in this action against the defendant and therefore their verdict must be for the defendant. (*Refused.*)

Defendant's 2nd Prayer.—As matter of law, under the pleadings in this case, the plaintiff's servant or agent so far directly by his negligence contributed to the accident resulting in the death of the plaintiff's horses complained of in this case, that the plaintiff cannot recover in this action, and their verdict must be for the defendant. (*Refused.*)

Defendant's 3rd, Prayer.—That under the pleadings in this case, there is no evidence legally sufficient from which they can find that the horses mentioned in the evidence were struck by a train of the defendant elsewhere than on the exclusive right of way and property of the defendant; and that since there is no evidence legally sufficient from which they can find that the horses mentioned in the evidence got upon the said exclusive right of way by any wrongful act or omission of the defendant or of its servants or agents, neither the defendant nor its servants or agents in the management and control of the defendant's train mentioned in the evidence were under any legal obligation or legal duty to anticipate or to keep a lookout for the said horses being on the exclusive right of way and property of the defendant; and therefore if the jury find from the evidence that as soon as the defendant's servants and agents actually became aware of the perilous position of said horses on the bridge mentioned in the evidence from actually seeing them or otherwise, the defendant's servants and agents used reasonable and ordinary care under the circumstances to avoid injuring said horses with the defendant's train, then the verdict of the jury must be for the defendant, even although the jury may find that if the defendant's servants and agents had become aware of the perilous position of said horses on said bridge sooner than the jury find they actually did, the said servants and agents

of the defendant could have avoided the accident complained of in this case. (*Refused.*)

Defendant's 4th Prayer.—That under the pleadings in this case, if they find from the evidence, that the defendant's servants and agents in the management and control of the defendant's train mentioned in the evidence, as soon as they or any of them actually became aware of the perilous position of the horses mentioned in the evidence on the bridge mentioned in the evidence, by seeing said horses or otherwise, used reasonable and ordinary care under the circumstances mentioned in the evidence to avoid injuring said horses with said train, then the verdict of the jury must be for the defendant, even though the jury may find from the evidence that said horses were struck and killed or fatally injured by said train, and even though the jury may find that if the defendant's servants and agents had become aware of the perilous position of said horses sooner than the jury find they actually did, the accident complained of in this case would have been avoided. (*Refused.*)

Defendant's 5th Prayer.—That under the pleadings if the jury find from the evidence that the defendant's servants and agents or any of them in the management and control of the train mentioned in the evidence did not see the witness, Wm. J. Kane, waving for them to stop the said train until the engine of said train was within about 250 yards of the bridge mentioned in the evidence, and that as soon as said servants or agents, or any of them, saw the said Wm. J. Kane waving for them to stop the said train they used reasonable and ordinary care to avoid striking the horses mentioned in the evidence, but did not do so, yet the verdict of the jury must be for the defendant, even although the jury may find from the evidence that the said witness Wm. J. Kane was waving and signalling for the said train to stop while the said train was rounding the curve mentioned in the evidence near Luther-ville, mentioned in the evidence, and until the said engine reached a point about 250 yards from said bridge. (*Granted.*)

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Defendant's 6th Prayer.—That it was the duty of the plaintiff's employees, John Scarborough and Robert E. Williamson, mentioned in the evidence, after finding the horses in the bridge, as testified by them, to use all reasonable and ordinary care to prevent said horses being struck by a train of the defendant, and if the jury find from the evidence that the said employees or either of them had time, after finding the horses in said bridge as aforesaid, and if the jury find that it would have been reasonable care on their part or on the part of either of said employees to have gone up the southbound track mentioned in the evidence, a sufficient distance to signal any trains that might have been coming south towards the said horses to stop, and could have thus prevented the accident complained of in this case; and if the jury further find that said employees or neither of them did so, then the verdict of the jury must be for the defendant; even although the jury may find that the witness Kane went up the said southbound track to signal trains coming south to the distance as testified to by him. (*Refused.*)

Defendant's 7th Prayer.—That there is no evidence in this case legally sufficient from which they can find that the accident resulting in the injuries to the horses complained of in this case was caused solely by the negligence of the defendant, its servants and agents, without any negligence on the part of the plaintiff or his servants or agents directly contributing thereto, and therefore the verdict of the jury must be for the defendant. (*Refused.*)

Defendant's 8th Prayer.—If the jury shall find from the evidence that on the 22nd day of September the horses of the plaintiff attached to the wagon were being driven along the road, and that by reason of the breaking of the pin in said wagon said horses became frightened and broke away from said wagon and escaped from said driver and ran in and upon the railroad of said defendant, and fell upon and into the bridge or culvert in said road, as testified to, and shall further find while said horses were in said bridge or

culvert the engine and freight train of said defendant going south approached said bridge, and that the engineer in charge of said engine and cars after passing Lutherville was on the lookout in his cab and saw persons standing in and upon said roadbed at and near said bridge or culvert, and supposed them to be workmen of said defendant on said road, and shall further find that within a distance of four or five telegraph poles north of said bridge a person or persons on or near said track signalled with a hat and handkerchief to said engineer to stop said train, and if they shall further find that immediately thereupon said engineer threw on the emergency brakes, applied sand to the track and reversed his engine, and was unable to stop said train before reaching said bridge, and that said engine struck said horses while in and upon said bridge, and that said horses were thereby killed, that then the plaintiff cannot recover in this action. (*Granted.*)

Defendant's 9th Prayer.—If the jury shall find from the evidence that the plaintiff's horses became frightened and escaped from their driver, and ran away and in and upon the roadbed of the defendant, and fell upon and into the bridge or trestle, as testified to, and further find that while in said position said horses were struck by the engine drawing a train of freight cars of said defendant, which resulted in the death of said horses, and if they shall further find from the evidence that the engineer and those in charge of said train used ordinary care and prudence in the management of the same, and could not have stopped the same in time to avoid striking said horses, that then the plaintiff cannot recover in this action. (*Granted.*)

Defendant's 10th Prayer.—That there is no legally sufficient evidence in the case of negligence or the want of ordinary care and prudence on the part of the agents of said defendant in the management of its engine and cars, directly contributing to the accident resulting in the death of the plaintiff's horses, and their verdict must be for the defendant. (*Refused.*)

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Opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE THOMAS, PATTISON and UERNER, JJ.

Shirley Carter, for the appellant.

T. Scott Offutt and *Ernest C. Hatch*, for the appellee.

PEARCE, J., delivered the opinion of the Court.

This suit was brought to recover damages for the killing of two horses of the plaintiff by a freight train of the defendant, while the horses were fast in a trestle bridge into which they had fallen upon the private right of way of the defendant. As the legal sufficiency of the evidence adduced to prove the negligence of the defendant, and that such negligence was the *sole* cause of the death of the horses, *without any negligence on the part of the plaintiff directly contributing thereto*, is challenged by the prayers that were refused, it will be necessary to state somewhat fully the testimony in the case.

At the time of the accident, or just before its occurrence, two of the plaintiff's servants, John Scarborough and Robert Williamson, were hauling coal in a wagon drawn by these horses, from Sherwood station on the N. C. Railway to plaintiff's residence about a mile distant. Scarborough was the plaintiff's driver, and Williamson was his helper in loading and unloading. While returning to the station with the empty wagon, both men being then in the wagon, the bolt which fastened the tongue to the wagon broke or fell out, and the horses ran off with the pole and double and single trees attached. Scarborough was pulled off the wagon by the horses, thrown down, and the reins torn from him, and Williamson was left in the wagon. When the horses reached the car from which they had been loading coal, they ran upon the track of the railway towards Lutherville, Scarborough and Williamson running after them. Learning the direction the horses had taken, these men followed up the railway and

found both horses on the south bound track fast in a trestle bridge over a small stream, both horses resting on their bellies on the ties, all four legs of each horse hanging below the ties. The pole was still attached by the neck yoke, but the double and single trees had been lost. This bridge is something over a quarter mile north of Sherwood station where the horses went upon the track, and about three quarters of a mile from Lutherville station, and between these two points the track is straight, but curves to the northeast a very short distance above Lutherville station.

William Davis was walking on the track going south as the horses approached in a run going north, and ran to meet them about ten yards south of the bridge, but was unable to stop them; and when they struck the bridge they fell through the ties as above described. Davis was a colored man and the first person at the spot, about two minutes before anyone else. He called two other colored men in a field nearby, and these came next, with another colored man, and about the same time, Scarborough came, followed by Williamson a little later. The next man on the spot was Mr. Kane, a salesman for a city firm who was driving across the track on a private road 800 feet south of the trestle, when the horses came up in front of him at full speed. He tied his horse to a fence and went up to the trestle where the horses were fast, with four colored men and two white men around them. When Scarborough came up, one of the colored men, Jenkins, told the others that if they would go and get some lumber from a shed nearby, they could get the horses out, and Scarborough and some others got a number of boards from this shed, and laid them close together on the ties, thinking by this means to get the horses out, which were then apparently uninjured and perfectly quiet. Mr. Kane testified that when he got there the pole was still attached, but was unhooked while he was there; that someone said there would be a train along shortly, and he said, "if you men will keep on carrying lumber I will go up and stop the train," and that he did then go up the track "about a quarter of a mile," and that

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when he saw the engine turn the curve at Lutherville he waved his hat and handkerchief, looking toward the train all the time, and not seeing what was behind him; that the train approached and when it came up to him he jumped to the side, and turned and came back towards the bridge; that he was too far up the track to see when the horses were struck, though he knew the engine passed the bridge where the horses were, and that the engine and about half a car length were beyond the bridge when the engine stopped. One of the horses was killed outright; the other was badly injured, but after the engine was backed, it got up and could walk, but it was afterwards necessary to kill it to relieve its suffering.

Scarborough said, Mr. Kane said, while they were getting the boards, he would go up and signal the train, and he went, but that he did not know how far up he went, and that he saw the smoke of the train near Lutherville before it got to the station. Davis said he spoke to a white gentleman about stopping the train who said he would take charge of it; that he, Davis, thought the boards were of no use, and that the only way to save the horses was to have the train stopped, and get a derrick to lift them out of the trestle. Jenkins said he could see the smoke as the train came round the bend, and he said, "here comes the train," and the white gentleman replied, "you work on the horses, and I will stop the train."

The train was composed of twenty-five cars all loaded, mostly with coal, averaging thirty-four feet in length, and the grade from Lutherville to the trestle a medium down grade. The engineer, Mr. Wilson, was an experienced man running as such on that railway ten years. He said: "When I came round the curve I saw a gang of men at work, trackmen I supposed, and I ran about half the distance, probably about 275 yards, then I saw a man run up the track and wave a handkerchief. I threw my brake in emergency, threw sand on the rail, reversed my engine and ran into the horses; that was the best I could do, and I did everything that could possibly be done." He said gangs of trackmen are met every

four or five miles, and no signal is ever required for them. Their foreman looks out for them. If the men at the trestle whom he took to be trackmen, had been such, and the condition of the bridge was dangerous, the rule required them to send a man with a red flag as far up as Lutherville to signal him to stop in time to avoid the danger. He first saw the signal when he was about 275 yards from the trestle, and he supposed the bridge was in a dangerous condition. His first thought was to stop as quick as he could to avoid danger to the crew and the train. This was his duty under a strict rule.

The conductor, Mr. Miller, was on the engine at the time. He said they were about 250 yards from the trestle when he saw the man signalling, and at once he heard the air go on, and the train was going about 25 miles an hour. The fireman, Mr. Taylor, was firing as they came towards the trestle, and did not either see the men on the trestle, or the man signalling until he heard the engineer "slap on the emergency brake" when he jumped up to look, but immediately after looking into the fire box while firing, one cannot see clearly. When about two car lengths from the trestle he jumped off, as he was taking no chances, and the conductor jumped also.

The engineer said he did not see the horses until he was within about one hundred feet of the trestle, because his attention was upon stopping the train; Taylor said he did not see what was the matter until he lit on the ground, and it does not appear when the conductor first saw the horses. Riley, the flagman on the train, was in the caboose at the rear when the train stopped, and saw nothing of what occurred.

Morrison, was brakeman on the train in the middle of the train. He said that he knew from the action of the train that the emergency brakes were applied but he could not say how far they were from the bridge when they were applied and that he saw no signal at any time.

Donnelly, foreman of track gang at that section of the railway said that if they were working on that trestle and it

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was necessary to flag the train, that he always sent the signal man above Lutherville on account of the grade, and that their book of rules calls for 1200 yards, but they always named a place to designate the required distance.

Mr. Fridinger for the plaintiff, in rebuttal, having been a locomotive engineer for twenty-three years and familiar with the handling of the air brake up to the year 1900, said he had seen the section of the railway used in evidence in this case, and that in his opinion with an emergency application of the Westinghouse air brake with which the train was equipped, it ought to be stopped inside of 250 yards.

To the contrary, Mr. Watkins, a locomotive engineer for ten years for defendant, and thoroughly familiar with that section of that railway, in answer to a question describing the circumstances as has been detailed herein, said positively that in his opinion that train could not have been stopped before crossing the bridge.

The above summary of the testimony is sufficiently full to permit a proper examination of the rulings on the prayers, which are brought up by the 16th exception, there being fifteen exceptions to rulings on the testimony.

The plaintiff offered three prayers all of which were granted, and the defendant offered ten, of which the 5th, 8th and 9th were granted, and all the rest were refused. We shall request the reporter to insert them all.

The principal questions are raised by these prayers. All of the plaintiff's prayers are based upon the contention that this case is within section 287 of Article 23 of the Code of Public General Laws, which is as follows:

"Railroad companies shall be responsible for injuries resulting in death, or otherwise inflicted upon any stock, as cattle, horses, hogs, sheep, etc., or by fire occasioned by their engines or carriages, upon any of their roads and the branches thereof, unless the said companies can prove to the satisfaction of the justice or other tribunal before which the suit may be tried, that the injury complained of was committed

without any negligence on the part of the company or its agents."

The defendant contends: 1st. That the above statute is not applicable to this case, and that it was error therefore to grant any of those three prayers. 2nd. That the case should have been taken from the jury as requested in the defendant's 1st, 2nd, 7th and 10th prayers, for the reasons therein stated. 3rd. That even if the statute should be held applicable, and the case be allowed to go to the jury, it was error to grant the plaintiff's prayers which ignored the evidence of contributory negligence on the part of the plaintiff. 4th. That if none of these contentions be sustained, there should still be a reversal for error in refusing the defendant's 3rd, 4th and 6th prayers.

The statute in question was enacted in 1838, and has been frequently before this Court, though the precise question here presented has never been considered, nor so far as we have been able to discover has it been decided elsewhere under a similar statute.

The statute was first considered in *Baltimore and Susquehanna R. R. v. Woodruff*, 4 Md. 242, where the damages claimed were caused by fire. A previous Act, Ch. 309 of 1837, made railroads responsible in damages for property injured by fire caused by engines on the road, *whether there was negligence or not*. Referring to that Act, JUDGE ECCLESTON said in *Woodruff's Case*, *supra*: "The Legislature deeming it too severe and rigorous, thought proper again to make the absence of negligence a defence, and for that purpose passed the Act of 1838. In doing which, we think, they have restored the rules of the common law in relation to negligence, *except only releasing the plaintiff from the obligation to prove it, and casting the onus of proving its absence on the defendant.*" And the Court there further said: "The words without *any* negligence, must mean, without any negligence occasioned by the want of *reasonable care*. * * * The statute does not give any new cause of action, nor does it give a new action to recover damages for an injury known to the com-

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mon law. It *simply changes a rule of evidence*, by releasing the plaintiff from proving negligence if the fact of the fire" (or as in this case, the fact of the killing of the horses) "is established, and casts the *onus* upon the defendant of showing there *was no negligence*, or, in other words that there *was proper diligence*."

To this construction of the statute the Court has consistently adhered in all the later cases, in accordance with the cardinal rule of interpretation "that it is not to be presumed that the Legislature intended to make any innovation upon the common law further than the case *absolutely* required." *Hooper v. Baltimore*, 12 Md. 475. The disposition of the Court wherever the question of the construction of the statute has arisen, has been to restrict its application. This is well illustrated in *Lamborn's Case*, 12 Md. 257, the first case reported touching injuries to stock. In that case the Act of 1846, an amendment of the Act of 1838, was discussed, its language requiring the defendant to prove that the injury *was the result of unavoidable accident*. The Court said that language imposed on the company the *highest* degree of care and caution, but nevertheless held that the Act applied "only to those cases where the party complaining has not contributed in any manner by his own negligence or violation of law to the act complained of. Or in other words, the rule of the common law to which we have adverted remains unchanged by the Acts of Assembly to which we have referred."

In *Keech's Case*, 17 Md. 46, JUDGE BARTOL, referring to *Lamborn's Case*, said: "We can give no other construction to these Acts of Assembly than that which we have heretofore declared. They leave the question of negligence on the part of the plaintiff where it was at the common law and do not confer upon a party who is himself a wrongdoer, the right to obtain redress for the consequences of his own misconduct or negligence."

In *Pumphrey's Case*, 72 Md. 82, the suit was brought to recover the value of two mules which were killed in a collision with an engine belonging to the defendant railroad com-

pany. The mules were being driven by the plaintiff's servant with the cart to which they were attached, over a private crossing of the railroad. No bell was rung nor whistle sounded at the approach to the crossing, though there was a curve which prevented anyone from seeing the train more than thirty or forty yards from the crossing, and the train was behind its schedule time and running fifteen miles an hour. It was held that in the absence of a statute requiring a signal at private crossings, there was no legally sufficient evidence of negligence by the defendant, and when the plaintiff then invoked this statute to rescue the case from the common law rule, JUDGE McSHERRY said briefly: "This section shifts the burden of proof *in cases to which it applies*; but it has no relation whatsoever to a case like the one now before us. It was designed to apply to cattle or other live stock *estrays* upon the track, *or* not under the dominion or control of an intelligent agent when injured." It does not appear that there was any question of contributory negligence in *Pumphrey's Case* to take it out of the grasp of the statute, and the mules were not *estrays* but were in the charge of the plaintiff's driver. JUDGE McSHERRY must therefore have meant that the Act did not apply, because they were in his *charge*. It is true that the words he used were, "under the dominion and control of an intelligent agent," and the meaning which the plaintiff seeks to impose upon those words in the connection in which they are there employed, is that the agent must have *such* dominion and control as to enable him to prevent their getting on the track, or to remove them at pleasure, if on the track. It is properly conceded in this case that these horses escaped upon the track without fault on the plaintiff's part, and if, having fallen in the trestle as they did, they had been injured by the train, *before the plaintiff's servants overtook them, and resumed charge and control of them*, a different situation would have existed. Reference to the cases of *B. & O. R. R. v. Mulligan*, 45 Md. 486, and *Western Md. R. R. v. Carter*, 59 Md. 306, we think throws a strong light upon the true meaning of JUDGE McSHERRY'S

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language. In *Mulligan's Case*, the plaintiff's prayer speaks of the cow as "*unattended at the time she was killed*," and the defendant's prayer speaks of it as having "*no one in attendance upon her at the time she was killed*." And in *Carter's Case*, JUDGE ALVEY, interpreting the principle applicable to these cases, uses the same language, "*unattended*." It cannot be presumed that "dominion and control" was intended to mean *absolute dominion and control*, the absolute power to keep the animal out of, or instantly remove it from danger. It must rather mean such control as domestic animals are supposed to be subject to when in the custody of the owner or his agent. To illustrate, let us suppose that these horses while being driven by the master's servant had taken fright at some object by the roadside, and getting the bit in their teeth had run away upon a private road, crossing a railway and had been injured or killed by a collision at that point. Suppose that the driver had lost all dominion or control over them, and was helpless to arrest their flight, or check their speed, could it be contended that this statute would apply to the case? The animals would not be estrays, or unattended, they would be as fully in the care and under the management of the servant, as they were before their fright. They would still, in legal contemplation, be in the "dominion and control" of their driver. In the case before us, these horses were out of the dominion and control of the plaintiff's servants during the interval between their escape, and the resumption of their care and management when Scarborough and Williamson found them in the trestle. Before that time, the care and caution required of them, was to keep the horses from getting upon the track where they *might* be injured by an engine. The fact that the horses were helpless in the trestle, and they were powerless to release them, did not relieve them from the duty of care and caution for their safety. It merely changed the *character* of care and caution required of them, and by reason of the perilous situation of the horses, and the imminent danger of the approach of a train at any moment, imposed upon them the highest degree

of care to warn approaching trains *with the utmost promptness*, of the situation of the horses. The effort to release them by bringing boards to place upon the ties was well meant, but ill directed, and was in disregard of the sensible suggestion of Davis that the only way to save them was to stop a train and get a derrick. The obvious duty was to send someone immediately such a distance up the south bound track to signal the train as would ensure the ability to stop it before it reached the trestle, and this was a duty which was imposed upon the plaintiff's servants themselves, though we do not mean to say, that if timely notice were given by anyone, the defendant would not be responsible *under the common law rule*, for failure to stop in time to avoid inflicting injury.

We are of opinion for the reasons above stated, as held in *Pumphrey's Case*, that the statute does not apply to a case of this kind, and that the failure to provide with *promptness* for flagging the train, was negligence directly contributing to the injury, and for both these reasons, it was error to grant the plaintiff's prayers.

This Court has held many times that even at a public crossing a railroad track is in itself a signal and warning of danger, because the traveller can never tell when a train will pass that point. Upon the same principle it must be negligence for one whose horses are fast in a trestle upon the private way of a railroad, though without his fault, not to anticipate the approach of a train at any moment, and to waste precious time in idle devices for the extrication of his horses, instead of acting immediately for their protection by prompt and efficient warning of all approaching trains.

It is a familiar proposition of the law of negligence that although the plaintiff may have been guilty of negligence without which the accident could not have occurred, he may yet recover, provided it is made to appear that the defendant, by the exercise of due care, after becoming aware of the danger to which the plaintiff's person or property was exposed, could have avoided the consequence of the plaintiff's

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negligence, but as was said by JUDGE ALVEY in *Northern Central Railway v. Geis*, 31 Md. 366: "This however implies time for the one party to become aware of the conduct and situation of the other, for neither could be required to anticipate the negligence of the other."

It was for the purpose of rescuing this case from the consequence of the negligence of the plaintiff that the testimony of Mr. Fridinger, which has heretofore been set out, was offered.

He was an expert locomotive engineer, and after testifying that he had been in Court during the trial and heard the witnesses and the evidence in the case, and was familiar with the handling of the Westinghouse air brake, he was asked the following hypothetical question: "From the observation of the track which you made and your familiarity with the Westinghouse system of air brakes what would you say as to the possibility of stopping a train such as that described by Mr. Wilson in his testimony within a space of 250 yards." This question was excepted to, but the exception was overruled and he gave the answer which has already been set out.

It will be observed that this question omits any reference to the speed at which it was shown the train was moving when the signal of danger was first seen by the engineer. It goes without saying that the speed of a train is the most material factor in the inquiry within what space it can be stopped. When that element is omitted from the hypothesis the witness has no rational or legal basis upon which to support an answer. A hypothetical question must embrace every material element of the hypothesis founded upon the evidence, and it must not import into the question any element not founded upon the evidence in the case. If it offends in either respect it is defective and it is error to permit such a question to be answered, and if inadvertently admitted over an objection, it is error to refuse a motion to strike out the answer.

In *B. & O. R. R. v. Dever*, ante, page 296, decided at the present term, JUDGE BOYD said, in passing upon an exception to a hypothetical question relating to the infection of cattle

with Texas ticks, at a stock yard controlled by the defendant railroad: "There is not one word in the question suggesting that there was a dead alley ten feet wide between the two alleys. On the contrary the inference which might be drawn is that the alleys were contiguous. It is a very important fact as the ticks could get through the fences more readily than they could get over the alley and through the two fences," and this illustrates the care with which the Court seeks to protect parties against injury by opinion evidence based upon a hypothesis which does not embrace every material fact in evidence affecting the hypothesis. What we have said is applicable both to the 10th and 11th exceptions.

When the answer to this hypothetical question is eliminated, there is not a shred of evidence to show that the defendant could by the utmost care and caution have stopped the train in time to avoid striking the horses. There can be no recovery in a case of this sort unless there is a breach of some duty on the part of the defendant to the plaintiff by reason of which breach the plaintiff has suffered injury. *Maenner v. Carroll*, 46 Md. 212. The defendant here owed no duty to the plaintiff in respect to the speed of the train, or in keeping a look out for gangs of trackmen, or for trespassers upon its exclusive right of way. The only duty owed to the plaintiff in this case arose when and not until when, the engineer saw the signal of danger given by Kane. Then it became his duty to avoid injury if possible to any person, or the property of any person exposed to danger at or near the point where the signal was displayed. *Kehoe's Case*, 83 Md. 452. Did not the defendant's servant the engineer fully discharge this duty? He testified that the moment he saw the signal, "I threw my brake in emergency, threw sand on the rail and reversed my engine, * * * my brakes were working perfectly, * * * and I did all in my power to get it stopped." He said his whole attention was given to the effort to stop the train, that as soon as he saw the signal he thought something was the matter with the bridge, and he did not see the horses, nor know what the trouble was until he got within

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about one hundred feet of the bridge and found it was impossible to stop, when he looked to his own safety. The conductor and fireman heard the emergency brake applied and the air go on, about the distance from the bridge testified to by the engineer, though they did not see the signal until the brake was applied.

Watkins the locomotive expert of the defendant testified positively that in his opinion the train could not possibly have been stopped in that distance 250 yards, and the hypothetical question put to him embraced specifically every material factor of the hypothesis, and was not excepted to.

A very simple analysis of the testimony as to the distance between the bridge and the point where the train came in sight, will show that Mr. Kane could not by any possibility have gotten a half or a quarter of a mile up the track when he met the train.

It was 3885 feet from the bridge to Lutherville station, or approximately seven-tenths of a mile. The train was running twenty-five miles an hour, or about a mile in two minutes and a half, so that it would cover the 3885 feet in something under two minutes. If Mr. Kane is assumed to have been going up the track at the rate of four miles an hour, which is good walking speed, the train was going six times as fast as he was going, and the train would cover five-sixth of the distance while he covered one-sixth. This would bring the two together 664 feet, or 221 yards from the bridge, which nearly agrees with the testimony of the engineer, and is wholly at variance with the judgment of Mr. Kane, who in one place estimates that he had gone half a mile up the track and in another a fourth of a mile. He also testified on cross-examination that he thought it took him about two minutes to go from Parr's road where he hitched his horse to the bridge, and the draftsman of the plat in evidence testified that this was 780 feet or 260 yards.

To permit the jury to determine upon such evidence even if Mr. Fridinger's testimony were not eliminated, whether the train could have been stopped after the signal was seen, in

time to avoid the accident would have been to invite them to found their verdict upon pure speculation, and there was upon the whole case, no legally sufficient evidence to support a verdict for the plaintiff, upon the ground that the train could have been stopped in time to avoid the accident.

We are therefore of opinion that the defendant's first and second prayers which asked that a verdict for defendant be directed, should have been granted. In this view of the case it is unnecessary to consider the other prayers or any of the other numerous exceptions to the testimony, though we should add that we have discovered no error in these latter exceptions.

Judgment reversed without awarding a new trial, costs to be paid by the appellee above and below.

PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY vs. EARL CRAWFORD.

False Arrest and Imprisonment—Liability of Railway Company for Assault and Arrest of Passenger at Station by Agent—Measure of Damages—Whether Agent Was Acting Within the Scope of His Employment—Instructions—Evidence.

A person who comes on the grounds or approaches of a railway station for the purpose of taking passage on a train is a passenger, and the railway company is liable in damages for an assault there made on him without just cause by one of its employees, acting within the scope of his employment, and for the subsequent imprisonment of such person.

When the arrest and imprisonment of a passenger is made by an officer or agent of a railway company in charge of its sta-

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tion and grounds, it is for the jury to decide whether the arrest was made by the officer acting within the scope of his employment.

In an action for false arrest and imprisonment, the jury was properly instructed that if they found for the plaintiff, under other prayers, then, in assessing damages, they are at liberty to take into consideration the nature of the force applied to the plaintiff, his sense of indignity and humiliation, and award him such sum as, under all the circumstances of the case, they may deem a fair and reasonable compensation therefor.

When the evidence in the case is legally sufficient to show that the plaintiff was assaulted without just cause on the premises of the defendant railway company, and that the person who made the assault was the agent of the company, acting within the scope of his employment, prayers offered by the defendant withdrawing the case from the jury for lack of evidence were properly refused.

A prayer offered by the defendant railway company instructed the jury that if a third party asked the defendant's employee to arrest the plaintiff when he was not on the grounds of the defendant, and the employee pursued the plaintiff and arrested him after he had gotten on the defendant's premises, then the defendant is not liable. *Held*, that this prayer was properly rejected, and that the Court correctly told the jury, in place of it, that if they found that at the time the defendant's employee first undertook to arrest the plaintiff, he was in the public highway, and that the actual arrest was made on the grounds of the defendant, in the course of the pursuit of the plaintiff begun upon the highway, not in the course of the performance of his duties by the employee, then their verdict should be for the defendant.

When the question is whether an arrest made by an agent of the defendant was made when he was acting within the scope of his employment or not, a witness cannot be asked to state whether that agent had ever previously made an arrest of any person while acting as an officer of the defendant, within the scope of his employment as such. The error in the admission of such evidence is not cured by the circumstance that the Court admitted it only to show that the defendant had

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knowledge of the fact that such an arrest was within the scope of the agent's duty. The opinion of a witness that other arrests were made by an agent within the scope of his employment is not admissible. The question of fact for the jury to decide was whether or not this arrest was made by the agent while so acting.

Decided February 4th, 1910.

Appeal from the Circuit Court for Talbot County (PEARCE, C. J., and ADKINS, J.), where there was a judgment on verdict for the plaintiff for \$1,500.

The cause was argued before BOYD, C. J., BRISCOE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

James C. Mullikin and W. M. Shehan, for the appellant.

J. Harry Covington (with whom were *Wm. S. Evans* and *Omar D. Crothers* on the brief), for the appellee.

SCHMUCKER, J., delivered the opinion of the Court.

The appellee recovered a judgment, in the Circuit Court for Talbot County, against the appellant railway company for damages for an assault and battery and false arrest and imprisonment. The suit was instituted in the Circuit Court for Cecil County and then removed first to Queen Anne's County and afterwards to Talbot County, where its trial before a jury on the general issue plea resulted in the judgment from which the appeal was taken.

The events out of which the cause of action arose formed the closing scenes of a trip of a party, consisting of members of an amateur dramatic association, from Elkton to Havre de Grace on March 5th, 1907. After having a performance at the last named town the party went to the appellant's station for the purpose of returning to Elkton by the midnight train. While they were waiting in the station for the arrival of the train a disturbance occurred which resulted in

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the arrest of one of the party, named Green, by W. M. Baldwin, a night officer of the railway company, whose duty it was to keep order in and around the station.

After the arrest and removal of Green, the equitable plaintiff, Earl Crawford, in company with another member of the party named Jones, started from the station to go into the town of Havre de Grace for a purpose apart from their proposed railway journey. At or near the division line between the railway property and the public streets of the town they met a municipal night officer named Kelley with whom Jones entered into a conversation which resulted in an altercation that led to his arrest by Kelley. Baldwin, the appellant's night officer, having been drawn to the spot by the controversy between Jones and Kelley arrested Crawford and the two young men were taken by the officers to the town lockup and imprisoned in it for the night.

There is evidence in the record tending to prove that it was the duty of Baldwin as night officer of the appellant to keep order at its station building and grounds and to protect passengers and persons, waiting there to take passage on its trains, from injury and abuse. There is also evidence tending to show that the arrest of the equitable appellee was made upon the station property and other evidence tending to show that it was made beyond the limits of that property upon a public street of the town. The evidence is also conflicting as to his conduct and attitude at the time of his arrest.

At the close of the case in the Court below the plaintiff offered four prayers, all of which were granted by the Court. The defendant offered six prayers of which the first, second and fifth were rejected and an instruction given by the Court to the jury in lieu of the fifth prayer. The third, fourth and sixth prayers were granted. The plaintiff's prayers were as follows:

1st "If the jury believe from the evidence that the plaintiff on the fifth day of March, in the year nineteen hundred and seven, was on one of the approaches to the station of the defendant at Havre de Grace, and that said approach was in

the occupancy and under the control of the defendant, with the intention of taking passage on one of its trains, he was then a passenger of the defendant and it was bound to exercise all reasonable care to protect him from personal insult, injury and abuse; and if they shall find that the plaintiff while he was on said approach to the defendant's station for the purpose aforesaid was without any reasonable cause assaulted by one of the defendant's officers, agents or employees while acting within the scope of his employment, then the plaintiff is entitled to recover.

2nd. "If the jury believe from the evidence that the plaintiff on the fifth day of March, in the year nineteen hundred and seven, was a passenger of the defendant and on one of the approaches to its station at Havre de Grace, and that said approach was in the occupancy and control of said defendant, with the intention of taking passage on one of its trains to Elkton, then he was entitled to protection by the defendant from insult, injury and abuse; and if the jury find that the plaintiff while a passenger as aforesaid, without any reasonable provocation was assaulted and imprisoned by one of the defendant's officers, agents or employees, in charge of its said station and approaches as aforesaid, while acting within the scope of his employment, then the plaintiff is entitled to recover.

3rd. "If the jury find from the evidence that Baldwin on the night of March 5th, 1907, was an officer, agent or employee of the defendant company and in charge of the station, grounds and approaches in the control and occupancy of said defendant at Havre de Grace, and shall further find that the plaintiff at the time of his arrest as testified to in this case was on ground and approaches to said station that were in the control and occupancy of said defendant, and was a passenger of said defendant and behaving all the while in an orderly and proper manner, then it is for the jury to decide from all the facts and circumstances in the case whether or not when the plaintiff was so arrested as testified to in this case, the said Baldwin in making said arrest was

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acting as an officer, agent or employee of the defendant, and if they shall find that said Baldwin in making said arrest of the plaintiff was acting as an officer, agent or employee of said defendant within the scope of his employment then the verdict of the jury shall be for the plaintiff.

4th. "If the jury shall find for the plaintiff, then in assessing the damages they are to take into consideration the nature of the force applied to the plaintiff, Crawford, his sense of indignity and humiliation, and award him such sum as under all the circumstances of the case they may deem a fair and reasonable compensation therefor."

We find no error in the granting of those prayers. Most of the propositions which they embody were considered at length and passed upon by us in the case of the present *appellant v. Green*, 110 Md. 32. That suit was instituted by Henry M. Green a member of the same dramatic association for his arrest and imprisonment already referred to in the station, on the same night, while the party were waiting for the arrival of the train to Elkton, by the same officer of the railroad company assisted by the same special officer of the town. The legal principles involved in the two cases, so far as they relate to the arrest and imprisonment, are the same although their facts differ in that Green was confessedly in the station building when arrested while in the present case there is a conflict of evidence as to whether Crawford was upon the station property or the public street when taken into custody.

In Green's case we held it to be well settled that a person who enters upon the depot grounds of a railroad company for the purpose of taking passage on one of its trains is regarded in law as a passenger. It was conceded in the argument of the present case that if Crawford was arrested on the depot grounds after having entered them for the purpose of taking the train he must be regarded for the purposes of the case as having been a passenger, and as such entitled to protection at the hands of the appellant from the violence of its employees.

We have held in a number of cases that to entitle a plaintiff to recover for injuries suffered under such circumstances it must appear from the evidence that the wrongs sued for were done by an agent or employee of the defendant company while he was acting within the scope of his employment. We therefore deem it unnecessary to again review the law upon the subject. *Green's Case*, *supra*; *Central Railway Co. v. Peacock*, 69 Md. 263; *Deck v. B. & O. R. R. Co.*, 100 Md. 168; *B. C. & A. R. R. Co. v. Twilley*, 106 Md. 445; *Tolchester Co. v. Scharnagl*, 105 Md. 199; *B. C. & A. R. R. Co. v. Ennalls*, 108 Md. 199.

The first three of the plaintiff's prayers deal with the legal principles affecting the equitable plaintiff's relation of passenger to the defendant if they found the facts to be as therein stated, as well as the nature and extent of its liability for the acts of Baldwin as its employee, in accordance with the views expressed by us in the cases to which we have referred. The plaintiff's fourth prayer deals with the measure of damages. It asks only for compensatory damages and correctly states the law upon that subject.

The defendant's first prayer asks to have the case taken from the jury for want of any evidence legally sufficient to entitle the plaintiff to recover. Its second prayer asks for the same ruling because of want of legally sufficient evidence to show that Baldwin in making the arrest of the equitable plaintiff was acting as an agent or employee of the defendant. Both of those prayers were in our opinion properly rejected. The fact of the arrest is clearly shown by the proof and there is evidence in the record tending to show that Baldwin was acting within the scope of his employment when he made it.

The defendant's fifth prayer instructed the jury that if they found "that, at the time that Baldwin and Bauer came up to where Kelley was engaged in an altercation with the plaintiff and Jones, the said Kelley, Jones and Crawford, the plaintiff, were on Adams street in the City of Havre de Grace and that the said Jones was taken in custody while on said street, and that the plaintiff undertook to escape arrest or to

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go for assistance *or for any other purpose* and was apprehended or taken into custody by Baldwin at the request of the said Kelley, after the plaintiff had gotten upon the grounds controlled and managed by the defendant, still the defendant cannot be held responsible for the act of the said Baldwin in making said apprehension and arrest even though they may believe that the said Baldwin was an employee of the defendant."

In lieu of that prayer, which it rejected, the Court granted the following instruction: "The Court instructs the jury that if they find from the evidence that at the time the witness Baldwin first undertook to arrest the plaintiff he was in the public highway and that the actual arrest was made by said Baldwin on the grounds in the use and occupancy of the defendant in the course of the pursuit of the plaintiff by said Baldwin begun on said public highway not in the course of the performance of his duties as an employee of the defendant (if the jury so find) then their verdict should be for the defendant."

There was no error on the part of the learned judges below in substituting their own instruction for the rejected fourth prayer. The direction to the jury to find for the defendant contained in the prayer was apparently intended to be predicated first upon the fact that the plaintiff had been arrested in a pursuit begun outside of the defendant's property for offense committed beyond its limits, and secondly upon the further fact that the arrest had been made at the direction or request of Kelley who as a public peace officer had the right to summon assistance for that purpose.

The prayer was defective, in reference to its first ground, in not requiring the jury to find that the plaintiff had entered the defendant's property for the purpose of escaping arrest or that he had been arrested in a pursuit begun outside of the property. Under the terms of the prayer he might have gone on the property for the purpose of taking the train, not being at the time threatened with either arrest or pursuit. It was also defective, in reference to its second ground, in not re-

quiring the jury to find that Kelley was a public officer. The instruction given by the Court was free from objection.

There is but one exception relating to rulings on the admissibility of evidence. Mr. Morrison the assistant agent and ticket seller of the defendant at its Havre de Grace station was asked, when on the stand as a witness for the plaintiff: "Do you know or can you state from your own knowledge whether or not Milton M. Baldwin ever made an arrest or arrests of any person or persons, prior to March the 5th, 1907, acting as an officer of the Phila. Balto. & Washington R. R. Co. within the scope of his employment there as such officer?"

The defendant objected to the question but the Court admitted it over the objection saying: "The testimony isn't admitted with reference to the merits of the case but only to show the company had knowledge of the fact that such an act was within the scope of his duty."

The defendant took an exception to the Court's ruling.

The witness answered, "Yes, sir; I have known him to make arrests before." The admission generally over the defendant's objection of the same evidence in response to a similar question put to the same witness in *Green's Case* was held by us to constitute reversible error, even though it was subsequently proven in that case that Baldwin had arrested other people and placed them in the lockup. It was contended on behalf of the plaintiff in that case that the fact that Baldwin had made previous arrests tended to show that he was acting within the scope of his duty at the time he arrested the plaintiff. We held however that it had no such tendency and that its admission was calculated to injure the defendant.

We do not think the qualified admission of the evidence made in the present case removes the grounds of objection on which our former decision rested. It was admitted in this case "to show that the company had knowledge of the fact" that such an act as the plaintiff's arrest was within the scope of his duty. The company is presumed to know the terms

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and scope of the employment by it of its own agents and officers. It cannot be heard to say that it did not have that knowledge. The question to be determined on that branch of the case is whether the arrest of the plaintiff by Baldwin was in fact within the scope of his employment, not whether the defendant knew that such was or was not the case. If there had been an offer to show that Baldwin had made previous arrests under similar circumstances and that the company had ratified or approved of his conduct, those facts, in the absence of direct evidence of the terms of his employment, might have been admissible as tending to show that arrests of that character were within its scope. 31 *Cyc.* 1663. But no such offer was made in connection with the question to which the exception was taken. In no event however would the witness' opinion as to whether other arrests had been made within the scope of Baldwin's employment have been proper evidence to go to the jury in this case.

In *Deck's Case*, as well as in *Green's Case*, *supra*, we held that whether a servant in committing an assault was then acting within the scope of his employment is generally a question of fact for the jury, but the opinions of non-expert witnesses upon the subject is not admissible to aid the jury in arriving their decision.

The question put to the witness Morrison in *Green's Case* differed from the one put to him in the present case in that he was there asked whether to his knowledge Baldwin had made other arrests during the time of his employment by the defendant as its officer and prior to March 5th, 1907, without being asked, as he was in the present case, whether such arrests were made by Baldwin within the scope of his employment as such officer. The form of the question put to the witness in the present case is, if there be any real difference, more objectionable than that employed in *Green's Case* because it seeks to put directly in evidence the opinion of the witness as to whether Baldwin was acting within the scope of his employment when he arrested the plaintiff.

For the error in admitting that evidence of the witness Morrison the judgment appealed from must, in conformity to the views expressed by us in *Green's Case*, be reversed and the case remanded for a new trial.

Judgment reversed, with costs and case remanded for a new trial.

MARTIN CURLANDER vs. EDWIN W. KING, TRADING AS KING BROTHERS.

Construction of Statute Relating to Sale of Maryland Reports by Publisher Under Contract with the State.

The Act of 1904, Chap. 327, requires the publisher to whom the contract for printing the Maryland Reports is awarded to sell the volumes to the public, either bound or unbound, at the respective rates therefor designated in his contract; but the Act contains no provision as to the number of copies of any volume that the publisher shall be required to sell to any one purchaser. The petitioner in this case, a law book dealer, alleged that the defendant had refused to supply him with 225 copies of a volume of the Maryland Reports published by the defendant under his contract with the State in pursuance of the said Act, and asked for a mandamus directing the defendant to supply him with said number of volumes. *Held*, that the statute does not clearly impose upon the defendant, as the contractor under the Act, the duty, not only to sell the Reports direct to the public at retail for the prices stipulated in his contract, but also to sell in wholesale quantities to other dealers to serve their independent trade, and that the petitioner is not entitled to the writ of mandamus asked for.

Decided February 4th, 1910.

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Appeal from the Superior Court of Baltimore City (Stock-BRIDGE, J.).

The cause was argued before BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

Morris A. Soper, for the appellant.

Edgar Allan Poe and *Herbert King*, for the appellee.

URNER, J., delivered the opinion of the Court.

This is a proceeding for *mandamus*, and the appeal is from an order of the Court below sustaining a demurrer to the petition and refusing the writ.

The question involved is whether the appellee, as publisher of the Maryland Reports, under his contract with the State, can be compelled by *mandamus*, at the suit of the appellant, as a law book dealer, to sell to the latter a certain number of the volumes which he has demanded for the purposes of his trade.

It was alleged in the petition that in accordance with the provisions of Chapter 327 of the Acts of 1904 the State Reporter and Codifier advertised for sealed proposals for publishing the reports of the decisions of this Court for the term of five years beginning on the first Wednesday of June, in the year 1909; that the defendant (appellee) in response to the advertisement, filed a sealed proposal to print and publish and keep in the City of Baltimore for sale to the public in accordance with the terms of the statute volumes of the reports bound in first class law sheep at the rate of ninety-five cents per volume, and volumes in sheets unbound at the rate of forty-five cents per volume; that the contract was awarded by the Reporter to the defendant as the most responsible bidder who would agree to publish the reports as provided by the statute and sell them on terms most advantageous to the public and at the lowest price; and that the defendant entered

into a contract with the State in accordance with the terms of his proposal and gave bond as required by law to secure its satisfactory performance. It was further alleged that during the month of July, 1909, the defendant received from the Reporter the manuscript for Volume 109 of the reports, and published and then had on hand, at his printing establishment in Baltimore City, copies of the volumes both bound and unbound.

The petition then proceeded to charge that the petitioner (appellant) was and for many years past had been a dealer in law books and as such was well known to the legal profession; that for many years he had furnished to a large number of members of the Bench and Bar copies of the reports as they were published, which he was enabled to do by purchasing them in unbound volumes from the publishers and selling them to his customers after having bound them in a binding of high quality; that his bindings have been uniformly superior to those used by the publishers; and that his customers are still desirous of purchasing volumes of the reports as they are issued in order to secure a binding uniform with the other volumes of the sets heretofore published and purchased.

It was further charged that in June, 1909, after the contract had been awarded, the defendant, in response to an inquiry made by him, was informed by the petitioner that he had ordered and received from Baughman Brothers, the publishers of the reports for the preceding term of five years, two hundred and seventy-five unbound copies of each volume of the reports when published and had given scattering orders for each volume thereafter; that thereupon, the defendant, knowing that the petitioner had the unbound copies of the reports bound outside of the State and by parties other than those who bound the volumes for the defendant, stated that he would personally see the petitioner and arrange with him that the delivery to the legal profession of the bound volumes by the petitioner and the defendant should be made at the same time, and to that end the one first receiving the bound

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copies should make no deliveries until the other party was in a similar position; that the petitioner was thereby led to believe that when the next volume, 109, should be published the defendant would promptly deliver to the petitioner the number of copies he needed for his customers; that subsequently, in July, 1909, the petitioner sent to his customers notices stating the change in price of the volumes and soliciting a continuance of their subscriptions to the reports, and, having received from his customers orders for about two hundred and twenty-five copies, he ordered verbally from the defendant that number of unbound copies of Volume 109; that on September 9th, 1909, the petitioner learned for the first time that the volume had been printed and published and that some of the bound copies had already been delivered to members of the Bar, although in the meantime the defendant had failed to deliver to the petitioner any unbound copies; that on the following day the petitioner asked for the two hundred and twenty-five copies which he had ordered previously, whereupon the defendant denied the receipt of the order, and on the same day the petitioner ordered by letter, a copy of which is exhibited, two hundred unbound and twenty-five bound copies of Volume 109 and accompanied the order with a check for one hundred and thirteen dollars and seventy-five cents in full payment; that the defendant did not make any reply to this written order, though requested repeatedly to do so, and retained the check until September 15th, when he returned the check with a letter of that date, which is filed as an exhibit; that subsequently the petitioner through counsel informed the defendant by letter that he would, for the latter's convenience, waive his right to insist upon the delivery of the twenty-five bound volumes, but would insist upon the immediate delivery of the two hundred and twenty-five unbound copies; but that the defendant thereupon refused to deliver any copies to the petitioner; and that the action of the defendant in refusing to supply the necessary copies of the volumes has resulted and will continue to result

to the great damage and inconvenience of the petitioner and of the members of the Bench and Bar of the State.

In the defendant's letter of September 15th the receipt of the petitioner's check was acknowledged, as was also his letter demanding a "certain number of copies, bound and unbound, of 109 Maryland Reports." The letter then proceeds: "As we consider this demand for this number of copies very unreasonable and not having any bound copies ready that we could deliver to you at this time, we have delayed answering your letter, which we intended to do this A. M. Your Mr. Zimmer called upon us today and said that unless we delivered the copies per your order of the 10th in an hour, that you would enter suit against us. We herewith return you your check which you will see has never been used by us, respectfully declining to have you act as our sales agent."

The petitioner replied to this by the letter written through his counsel and exhibited with the petition. He disclaimed that he was assuming to act as the defendant's sales agent, and stated that his order was given by him, as part of the public which, he asserts, the defendant had undertaken to supply with bound and unbound volumes of the Maryland Reports at the rates fixed by his contract with the State. He insisted that the publisher had no legal right to pass upon the reasonableness of the number of copies of the reports, bound and unbound, which the public or any part of it may require, and that the reasonableness of the order in question was shown by the fact that the number required was less than he had heretofore ordered and received from the former printer of the reports. Attention was called to the requirements of Chapter 327 of the Acts of 1904 and especially to the provision that the publisher should keep on hand in the City of Baltimore for sale during the period of the contract, and for five years thereafter, a sufficient number of the volumes so published to supply the public demand and to sell them at the prices designated in his proposal. The letter indicated the petitioner's willingness to take the whole order

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for two hundred and twenty-five copies in unbound volumes in view of the defendant's statement that he had not ready the number of bound copies ordered, but insisted upon immediate compliance with the order as as thus modified.

The prayer of the petition was that a writ of *mandamus* be issued commanding the defendant "to sell to your petitioner two hundred and twenty-five (225) unbound copies of said Volume 109 of said reports as required by law."

In his answer to the petition the defendant admitted some of its allegations of fact and controverted others, but he expressly denied the jurisdiction of the Court to hear and determine the case attempted to be made by the petition and charged that the petitioner had no specific legal right to the writ of *mandamus* and that there was no want of a specific, adequate legal remedy for the petitioner in the premises, other than this writ, for any cause of action he might have against the defendant. According to the usual practice the objections thus made to the sufficiency of the petition to support the jurisdiction of the Court were heard and determined as upon demurrer, and upon this appeal, therefore, we have to inquire and decide whether or not the situation presented by the allegations of the petition is one which entitles the appellant to the writ of *mandamus* for the purpose designated.

There can be no uncertainty in this State as to the general principles to be observed by the Courts in granting or refusing this prerogative writ: "Its office, as generally used, is to compel corporations, inferior tribunals, or public officers to perform their functions, or some particular duty imposed upon them, which, in its nature is imperative, and to the performance of which the party applying for the writ has a clear legal right. The process is extraordinary, and if the right be doubtful, or the duty discretionary, or of a nature to require the exercise of judgment, or if there be any ordinary adequate legal remedy to which the party applying could have recourse, this writ will not be granted. The application for the writ being made to the sound judicial discretion of the

Court, all the circumstances of the case must be considered in determining whether the writ should be allowed or not; and it will not be allowed unless the Court is satisfied that it is necessary to secure the ends of justice, or to subserve some just or useful purpose." *George's Creek C. & I. Co. v. Co. Comm'rs.*, 59 Md. 259.

It is uniformly held to be "a settled doctrine in the law of *mandamus*, that the party applying must show a clear legal right in himself and a corresponding imperative duty on the part of the defendant; and without the establishment of such clear legal right and duty, there is no ground shown for *mandamus*." *State v. Taylor*, 59 Md. 338; *Brown v. Bragunier*, 79 Md. 234; *State v. Latrobe*, 81 Md. 238; *Wailes v. Smith*, 76 Md. 476; *State v. Register*, 59 Md. 283.

In cases of this nature the primary inquiry is logically directed to the alleged right of the petitioner and duty of the defendant upon which the application is predicated, because if these vital elements are wanting, a consideration of other requisites for the writ is superfluous.

The right of the appellant and duty of the appellee here insisted upon is that the latter sell to the former for *his retail business purposes* a considerable number of the Maryland Reports at the price fixed in the contract for their publication. In order, therefore, to grant the application for the writ in this case we must find that the appellee is charged under the law with the obligation not only to sell the work direct to the public at retail for the price stipulated in the contract with the State, but also to make distributions in wholesale quantities through other dealers to serve their distinct and independent trade. We must ascertain from the terms of the contract as prescribed by the statute whether such a duty is imposed upon the publisher of our reports.

The law dealing with this subject was enacted by Chapter 327 of the Acts of 1904 and is codified as Article 80 of the Public General Laws. So far as it is necessary to be quoted in this connection it provides that the Reporter shall advertise every five years for sealed proposals for the publication

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of the decisions of this Court, that the contract shall be awarded to the bidder agreeing to publish the reports on terms most advantageous to the public, and that the contract shall embody the following provisions: "The said reports shall be printed on first-class book paper, not inferior in printing or paper to volume 96 of the Maryland Reports, and shall contain not less than seven hundred pages, exclusive of the index and tables of cases and statutes, and shall be uniform in size, style and form with said Volume 96 Maryland Reports; nor less than twelve hundred copies of said volume shall be printed. The publisher shall deliver to the State library three hundred copies of each volume bound in first class law sheep; and the State shall pay therefor to the publisher the sum of six hundred dollars, being at the rate of two dollars per volume. And the publisher shall keep on hand in the City of Baltimore for sale during the period of this contract and for five years thereafter a sufficient number of the volumes which shall be so published to supply the public demand therefor, and sell the same to the public at a price designated in his proposal for volumes bound in first-class law sheep and at the price designated for volumes in sheets unbound. The reports shall be published promptly from manuscript to be supplied by the Reporter and under his supervision. If there be any unreasonable delay in the printing or publication of said reports it shall be his duty to employ others to complete the work at the cost of the contracting party." The Reporter is directed to award the contract "to the person whom he shall determine to be the most responsible bidder, who will agree to publish the said reports in the manner aforesaid and sell the same on terms most advantageous to the public, and at the lowest price;" and the publisher must "agree to sell the advance sheets of said volume at a price fifty cents less per volume than he shall be entitled to receive for the bound volumes." There is a provision that "no other publication of the said reports shall be authorized by the State so long as its copyright thereon remains in force; provided the publisher or his assigns shall

supply the demand therefor at the price stipulated in the contract."

The performance of the contract by the publisher is required to be secured by a bond in the sum of ten thousand dollars; and the Court of Appeals is authorized to terminate the contract if the publisher shall fail to satisfactorily perform its terms, and such failure shall continue for a period of three months after written notice from the Court.

The plainly expressed purpose of the statute is to ensure the publication and sale of the Maryland Reports upon the best terms for the "public." There is no attempt in the law to discriminate among those who are included within that comprehensive term, and it was undoubtedly employed in order that all purchasers alike might have the benefit of the price designated in the contract.

The publisher's obligation, therefore, is to refrain from exacting more than the contract price for the reports and to keep on hand a sufficient supply to meet the demand of the general public during the prescribed period. To this extent his trade is regulated and controlled by his agreement, but in other respects his ordinary right to manage his sales remains unrestricted. There is nothing in the contract affirmatively entitling an individual purchaser to order the reports in abnormal quantities, or requiring that the wants of any portion of the public be supplied by sales to other dealers. It was certainly not the intent of the law that an unlimited discretion in this regard should be conferred upon purchasers and that none whatever should be left to the publisher.

The purpose for which the volumes were ordered by the appellant was to resell them to his patrons, and as it is not suggested that *they* were unable to obtain the books from the appellee at the prescribed rate, the only material effect of the declination of the appellant's order was to deprive him of the opportunity to derive some benefit from the process of selling the reports to the public. An advantage of that nature might be secured through the voluntary action of the publisher, as appears to have been the case during the preceding

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five year period referred to in the petition, but it could not be exacted upon the basis of any legal right under the present contract. As that does not undertake to control the appellee's judgment or volition with respect to making such an arrangement, we do not regard his refusal to fill the order as a violation of his contractual duty.

In the case of *Little v. Banks*, 85 N. Y. 258, where a contract under a statute providing for the publication, and sale to the public, of the New York Reports was considered, there was an express requirement in the contract that the publisher should furnish the reports at the contract price to any other law-book-seller in the City of New York or Albany applying for them, in quantities not exceeding one hundred copies to each applicant unless the publisher should choose to deliver more. It was also provided that a party injured by the refusal of the publisher to sell and deliver as prescribed by the contract should be entitled to recover a designated sum as liquidated damages. The question involved was as to the legality of this stipulation, and the Court held it to be valid and enforceable; but the right of the law-book-seller to demand the reports was treated as depending upon the express terms of the contract to that effect. In the present case, as we have seen, there is no such contract provision for the benefit of dealers.

We have given due consideration to the suggestion made in argument that the stipulation in the law for the sale of unbound volumes should be taken as indicating an intention to provide for the needs of dealers who would buy the volumes in their unfinished form and bind them for their customers. It does not seem to us, however, that such an inference is reasonably required from the terms of the statute. There may be occasion for individual owners of sets of the reports to buy the newly published volumes unbound, and in the absence of any thing in the law to indicate that this particular provision was intended for the benefit of dealers as distinguished from the general public we do not feel warranted in adopting that construction.

In view of the opinion we have expressed that the refusal of the appellee to comply with the appellant's demand for two hundred and twenty-five unbound volumes of the reports did not constitute a breach of the contract for their publication and sale, we must conclude that there is no denied right of the appellant or unperformed duty of the appellee, shown in this case, to support the application for *mandamus*. It is, therefore, unnecessary to decide or discuss the questions, ably argued at the Bar, as to whether the duty of the appellee under his contract was of a *quasi* official character or susceptible in any event of enforcement by *mandamus*; whether the appellant would have an adequate remedy at law upon the case set forth in his petition; and whether there was a legal tender accompanying his demand.

In accordance with the views we have stated we hold that the Court below committed no error in sustaining the appellee's demurrer and dismissing the petition for *mandamus*, and its order will be affirmed.

Order affirmed, with costs.

DELAND MINING AND MILLING COMPANY vs.
ROBERT N. HANNA ET AL.

*Entries in Account Books Made by Party to the Cause—Sale of
Goods by Sample—Inferior Goods Delivered—
Evidence—Instructions.*

In an action by a firm to recover the price of goods sold entries in an account book made by one of the partners are not admissible in evidence.

When defendant ordered soapstone of a certain quality to be shipped to a third party by the plaintiff, in an action to recover the price, evidence is admissible to show that the goods as delivered were inferior to those ordered; that the plaintiff

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agreed that defendant might make an arrangement with the third party by which he would keep the goods after making a reduction in the price, and that soapstone of a higher quality might be mixed with the inferior at a reduction in the price thereof made for that purpose.

When money has been loaned to a member of a firm, evidence is admissible to show whether it was the understanding of the parties that the money was loaned to the firm or to the individual partner who obtained it.

In an action to recover the price of goods which were sold by sample a prayer is erroneous which declares that the plaintiff is entitled to recover the price without requiring the jury to find that the goods delivered were equal to the sample.

The buyer, in an action against him for the price of goods sold, is not entitled to have the jury instructed that an allowance should be made to him for the return of empty bags which had contained the goods, when there is no evidence in the case that any bags had been returned to the seller.

When the only evidence in the case is to the effect that the difference between the price of goods of the quality ordered and the price of goods of an inferior quality which were delivered was a certain sum, a prayer allowing the jury to deduct a larger sum from the seller's claim is erroneous.

Decided February 24th, 1910.

Appeal from the Circuit Court for Baltimore County (BURKE, C. J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, THOMAS, PATTISON and URNER, JJ.

Joseph N. Ulman (with whom were *Harman, Knapp and*

Tucker on the brief), for the appellant.

Jacob France (with whom was *John M. Little* on the brief), for the appellee.

PATTISON, J., delivered the opinion of the Court.

This case originated in a non-resident attachment proceeding, instituted by the appellees, Robert N. Hanna and Charles A. Williams, trading as the Eastern Mineral Company, against the appellant, The Deland Mining and Milling Company, to recover an amount alleged to be owing by the appellant to the appellees, for three car loads, sixty tons, of soapstone sold unto the appellant company, and upon its order shipped to the Ford Manufacturing Company of Vandalia, Illinois, with a charge therein for six hundred bags, in which the soapstone was shipped, at ten cents per bag.

The writ of attachment was sued out of the Circuit Court for Cecil County and placed in the hands of the sheriff of that county, who attached certain property of the appellant, and made his return thereto accordingly.

The appellant thereafter filed its bond, as provided by statute, and through its attorney, entered its appearance to the suit, whereupon the attachment was dissolved.

Upon suggestion of the appellant, the case was removed to the Circuit Court for Baltimore County for trial. The appellant pleaded to the short note or declaration, consisting only of the common counts, by filing the pleas of (1) never promised as alleged, (2) never indebted as alleged and (3) set-off, and with these pleas filed the following bill or account against the appellees:

STATEMENT.

BALTIMORE, April 21st, 1909.

Eastern Mineral Company,

To Deland Mining and Milling Company. Dr.

To this amount of cash paid you in June, 1906, to be
credited on general account and not so credited..... \$ 50.00
1907—

June. To this amount of allowance made to Ford Mfg.
Co., Vandalia, Ill., to induce them to accept inferior
goods shipped in violation of your agreement..... 124.00

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To this amount, being the difference between market value of 1 carload of superior soapstone and price at which we were compelled to sell said carload to Ford Mfg. Co. as a further inducement to them to accept inferior goods shipped by you to them in May and June, 1907.....	80.00
To value of 800 bags returned to you by Ford Mfg Co. and not credited.....	80.00
	<hr/>
	\$334.00

The case was tried before a jury, and resulted in a verdict for the plaintiff for the sum of two hundred and eighty-nine dollars and fifty-one cents (\$289.51) upon which verdict a judgment was entered for that sum.

At the trial of the case there were eight bills of exception reserved by the appellant; seven relate to the rulings upon the admissibility of evidence and one to the ruling upon the prayers.

The plaintiffs (appellees) offered the testimony of Robert N. Hanna, who testified that he was a member of the plaintiff firm, that his partner was Charles A. Williams; that he did not know where Williams was, had been absent from the city since December 1st, 1907, (about eighteen months); that the firm ceased to do business in June of that year; that the plaintiffs had business dealings with the defendant beginning in October or November, 1906, when they commenced selling Hilton J. Doggett at that time; that after that Doggett organized the defendant company; that on the 25th day of May, 1907, the plaintiff received an order from the defendant for three carloads of goods to be shipped to the Ford Manufacturing Company, of Vandalia, Illinois. The order was in these words:

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ORDER.

May 25th, 1907.

Eastern Mineral Company,
Baltimore, Md.

Gentlemen:—

Please ship in our name consigned to the Ford Manufacturing Company, Vandalia, Ill., as soon as possible three (3) carloads of your No. 100 fine Powdered Soapstone, and let us have the invoices and Bills of Lading for same at the earliest possible moment so we can put a tracer on these cars and hurry them forward to this Company. They are in urgent need of these cars, and will want two or three cars a month in addition to these three cars, provided we can serve them satisfactorily.

The price, terms and conditions of this order are the same as heretofore. Please advise when you will be able to get these cars off so we can advise the Ford Mfg. Co., and oblige.

He further testified that the goods were shipped pursuant to order; that he was familiar with the books of the plaintiff which were identified by him, and that the entries in them were made by Williams, his co-partner. The plaintiff then offered to prove by the witness the entries in the order book, so kept by his co-partner Williams, to which the appellant objected. Whereupon the witness was asked: Q. Were they made by you? A. No, sir. Q. At your direction? A. I saw them made, the date they were made. Q. Who made them? A. Mr. Williams. Q. Do you know whether or not they are correct, A. Yes, sir; they are correct and correspond with the order. Q. Your partner is out of the State and you do not know where he is? A. No, sir. The Court thereupon overruled the exception and the entries in the book were admitted in evidence. To this ruling of the Court the appellant excepted, and this constitutes the first bill of exception.

This was an offer to prove by the witness, the entries in the book of the plaintiffs, made by Williams, one of the plaintiffs, who was said to be at the time out of the State, and was evidently made for the purpose of proving the sale of the

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goods to the appellant, and their delivery to it, by the shipment of same to the Ford Manufacturing Company, as directed by the appellant.

In the case of *Romer v. Jaecksch*, 39 Md. 587, the plaintiff, to prove the sale and delivery of the goods charged, was called as a witness and produced a book, called the "order book" of the firm, which contained entries made by Campen, his deceased partner, charging the defendant with merchandise sued for in that case. The witness testified that "whenever Campen sold flour for the firm, he, Campen, was in the habit of entering the same upon an order book kept by the firm, and that the firm always engaged to deliver the flour that it sold, and also that he knew it to be the custom of Campen to make such entries in the course of business, at the time the flour left the store of the firm, in its wagons, on the way to the place of delivery. The order book contained entries of sales corresponding with those set forth in the account filed with the declaration, and also entries of payment for sales which the witness testified were in the hand writing of Campen." The defendant objected to the admission of these entries as evidence, but the lower Court overruled the exception and allowed the same to be read to the jury for the purpose of establishing the sale and delivery of the goods charged in the account. This Court, upon appeal, held that the entries were not admissible in evidence and in delivering the opinion of the Court, CHIEF JUSTICE BARTOL said that: "In this State the rule of the common law has not been departed from, and it has been held to apply only to entries made by a clerk, or other disinterested party; here the entries in question are those made by the deceased partner, a party to the transaction, having a direct interest in the subject-matter, and, therefore, not within the rule." This Court in the case of *Gill v. Staylor*, 93 Md. 467, speaking through JUDGE PEARCE, said: "It is of course clear, both upon principle and authority that entries made by a party himself charging another, are not admissible as evidence *per se*. Such entries stand upon a different footing from those made by a

clerk or other person in the ordinary course of business and contemporaneously with the transaction." The case of *Romer v. Jaecksch*, *supra*, was approved by this Court in *Stallings v. Gottschalk*, 77 Md. 429. And the cases cited by the appellees in their brief are not at all in conflict with these cases.

Upon the authorities above cited, it seems clear to us that the entries in the book of the plaintiffs were inadmissible, and that the Court below erred in admitting this testimony.

2nd. In the course of the trial Hilton J. Doggett, president of the Deland Mining and Milling Company, was called as a witness by the defendant company and testified that the plaintiffs manufactured several grades of soapstone, one called No. 80 and another No. 100 and a third called F. F. F., that samples of these different grades were furnished him, from time to time as needed, by the plaintiffs, but only No. 80 and No. 100 grades interested him. That samples of these, as well as samples of a higher grade of soapstone manufactured by the defendant company, and called Talc, to distinguish it from the common soapstone, were sent to the Ford Manufacturing Company of Vandalia, Ill. That after correspondence with the Ford Company the defendant company received orders, both for talc and soapstone of the No. 100 grade. The orders for soapstone, three in number, were each for one carload, containing twenty tons, and were dated respectively, April 24th, May 11th and May 20th, 1907. That upon the receipt of these orders he wrote the letter heretofore given, dated May 25th, 1907, to the Eastern Mineral Company, the plaintiffs, directing that company to ship these goods, No. 100 grade, to the Ford Manufacturing Company, Vandalia, Ill. That the soapstone was sold by sample furnished by the plaintiffs to the defendant company and which it in turn forwarded to the Ford Company.

The witness further testified that after receiving complaint from the Ford Company that the soapstone shipped by the plaintiffs was not up to samples, he took up this contention with Williams, one of the plaintiffs, who said he regretted it, but stated "that he realized the situation, and that it would

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not pay to bring the goods back from Vandalia to the mills at an expense of over \$4.00 per ton when the original value was only \$3.25, and told the witness to go ahead with the Ford Manufacturing Company and see if he could not arrange some way to keep the goods; that if witness was compelled to make any deduction or allowance to the Ford Manufacturing Company, Williams would credit him with these deductions or allowances. That he took the matter up with the Ford Manufacturing Company." The witness was then asked: "Mr. Doggett I want to explain to the Court and jury if there is any difference between talc dust and soapstone, the No. 100 grade such as you bought from the plaintiffs in this case?" The plaintiffs objected to this question. The Court sustained the objection and the witness was not permitted to answer the question, whereupon the defendant excepted, and this constitutes the second bill of exceptions.

3rd. The witness was thereafter asked: "Now, Mr. Doggett, come back to your story as we were progressing when the Court adjourned on Thursday, I understood you to say, you had taken up with Mr. Williams, the matter of objections made by the Ford Manufacturing Company to these three carloads of soapstone. Now I want you to tell his Honor and the gentlemen of the jury what conversation or understanding you had with Mr. Williams as a member of the plaintiff firm in regard to these three cars of soapstone?"

"Well, we understood I was to take the matter up with the Ford Manufacturing Company and try and adjust it with them and any allowance I had to make the Ford Company, why Mr. Williams would allow me from his bill, so I proceeded to take the matter up with the Ford Company on those lines and finally arranged with the Ford Company to keep the goods at a reduction, I think it was \$2.00 a ton." How many tons? "There was 60 odd tons in the lot, that made \$120.00, and there was some little discrepancies in the weight of the cars and on that account we had to make a further reduction of \$4.00, bringing the allowance up to \$124.00 (and it was also necessary to allow the Ford Company to

keep a carload of talc, which I had sold them, which was a superior grade of soapstone, at a reduction of \$2.00 per ton to mix with this inferior soapstone in order to bring it up to a quality they could use in their business and at a price they could afford to pay; that made a further reduction of \$40.).” The plaintiffs objected to that portion of the answer embraced within the parenthesis, and moved that the same be stricken out, which motion the Court granted and the defendant excepted thereto, and this constitutes the third bill of exceptions.

4th. The witness further testified that he discussed fully with the plaintiff Williams, the contention of the Ford Company and that it was agreed between Williams, representing the plaintiffs, and Doggett, representing the defendant company, that rather than bring the goods back to Maryland, it would be better to make the allowance of \$2.00 per ton. The witness was then asked: “Then you made an allowance on the talc, you say,” “Yes, sir; we also made an allowance of \$2.00 per ton on a car of talc I shipped them to mix with the soapstone; I told Mr. Williams we not only would have to make an allowance on this inferior soapstone but I would have to make an allowance on the car of talc, that is to put it to them at a very low price to mix with the soapstone and would have to reduce my price \$2.00 per ton and he said to go ahead and fix things up the best you can and that is what I done.” “What was the grade of talc worth on the market?” This question was objected to by the plaintiffs and the objection was sustained by the Court and witness was not permitted to answer the question, the defendant excepted and this constitutes the fourth bill of exception.

The second, third and fourth bills of exception may be considered together. The appellant in its defense to this suit contends that it should be allowed as against the plaintiffs’ claim: 1st. The amount of reduction made by it in the price of soapstone, sold by the appellant company and shipped by the appellees, upon the order of the appellants, to the Ford Manufacturing Company of Vandalia, Ill. And

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secondly, for the amount of reduction in price of talc sold and delivered by the appellant to the Ford Company. The appellant company alleging that these reductions were authorized and directed by the appellees, with the understanding between them that such reduction would be allowed the appellant company as credits upon the soapstone bought by appellants from appellees. And that these reductions were made necessary because of the inferior quality of the soapstone purchased by the appellant from the appellees and by the latter shipped to the Ford Company, the same being inferior to the sample by which it was purchased; and that to enable the Ford Company to use this inferior soapstone it was required to purchase a higher grade of soapstone to mix with it.

It was for this purpose, as it is alleged, that the carload of talc, was purchased and used by the Ford Company. Therefore evidence tending to show that the talc so bought for that purpose was soapstone of a higher grade than that with which it was to be mixed, should have been admitted, as it in a measure supports the contention of the appellant.

The appellant, however, was not in any way injured by the ruling of the Court below, in not permitting these questions to be answered, inasmuch as this witness, as well as the witness Ford, was permitted without objection, to testify to the facts which were sought to be elicited by these questions.

5th. The witness Doggett after further testifying that his dealings with the Eastern Mineral Company had been principally with Mr. Williams, was then asked: "In December, 1907, Mr. Hanna testified he had a conversation with you on the street in which he referred to his co-partner as being a damned rascal and he said there was some check transaction spoken of at that time; tell the gentlemen of the jury what that check transaction was?" "Why I told Mr. Hanna about a check that Mr. Williams got from me for \$50.00."

Following this answer in the record, is a copy of a check drawn by Hilton J. Doggett, General Manager, to Charles A. Williams, upon the National Exchange Bank of Baltimore for the sum of fifty dollars, dated the 11th day of June, 1906,

also copy of a check drawn by Charles A. Williams to Hilton J. Doggett upon the Sykesville Bank of Carroll County, for the like sum of fifty dollars, likewise dated June 11th, 1906. The copy of endorsement on the first of these checks shows payment of check. The second, as shown by copy of endorsement thereon, was protested for non-payment.

The plaintiffs objected to the question and answer and the objection being sustained the defendant excepted and this constitutes the fifth bill of exception.

6th. The witness was further asked: "Will you tell his Honor and gentlemen of the jury for what purpose did Mr. Williams state to you at the time he asked for this exchange of checks, as to what he wished to do with the proceeds of the check?"

This question was objected to by the plaintiffs and the Court sustaining the objection, the defendant excepted, and this forms the sixth bill of exceptions.

7th. He, Doggett, was further asked: "Would you have exchanged checks with him but for the fact that you had had business dealings with him?"

This question was also objected to by the plaintiffs and the objection being sustained, the defendant excepted, and this forms the seventh bill of exceptions.

We will consider the fifth, sixth and seventh bills of exception together.

The defendant in its account against the plaintiffs, filed in this case, charged them with the sum of fifty dollars alleged to have been advanced or loaned to the firm and which was never credited or returned to the defendant.

In the case of *Smith v. Collins*, 115 Mass. 398, the Court there held that whether the money loaned a member of a firm, is advanced upon his credit or upon the credit of the firm, of which he is a member, and whether the individual check of such person given for the loan is so far a payment thereof, as to leave the creditor no recourse to the firm, are questions of facts depending upon the intent, understanding and agreement of the parties.

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The advance or loan in this case not having been made upon the application of both members of the firm, but upon the application of one only, and the amount of the loan having been paid over to such member of the firm, who gave his individual check therefor, the burden is upon the defendant company to establish the firm's liability for the payment or return of the loan.

The defendant attempting to discharge this burden propounded to the witness, Doggett, the questions embraced in the fifth, sixth and seventh exceptions, which the lower Court, upon objection, would not permit the witness to answer.

The defendant should have been allowed to show to whom the loan was made and the credit given; whether to the firm or to Williams, one of the members, and in order to have done so, he should have been permitted to prove the intention, understanding and agreement of the parties in relation to such loan. The Court below therefore erred in rejecting the evidence.

The eighth exception is upon the ruling of the lower Court in granting the plaintiffs' first and third prayers and in refusing the defendant's second prayer.

The first prayer of the plaintiffs should have been refused. The soapstone sold by the plaintiffs to the defendant was sold by sample furnished by the plaintiffs to the defendant; the soapstone to be of the grade of the sample, and in condition and quality, was to conform thereto. Notwithstanding this, however, the first prayer of the plaintiffs does not require the jury to find, before entitling the plaintiffs to recover, that the soapstone so sold was of the grade, condition and quality of the sample. The expression used in the prayer "as ordered in good condition" does not satisfy the requirements. The jury should have been told, in language not misleading, that to entitle the plaintiffs to recover the amount sought to be recovered by them, that it was necessary for the jury to find that the soapstone delivered was of the grade of the sample and in condition and quality conforming thereto. Moreover this prayer instructed the jury that their

verdict must be for the plaintiffs for the sum claimed "if the jury do not believe said bags were returned to the Eastern Mineral Company *and by it credited to the defendant corporation.*" If by agreement the defendant was to be allowed credit for the empty bags returned to the appellees, it was not necessary for the jury to find that the plaintiffs had credited the defendant with the bags returned, if any were returned. before they could allow to the defendant credit for bags so returned.

As the Court rejected all evidence as to the check of fifty dollars given by Charles A. Williams to Hilton J. Doggett, it committed no error in granting the plaintiffs' third prayer, although, as we have before said, the evidence relating to this check should have been admitted.

The Court committed no error in refusing the defendants' second prayer. This prayer wrongfully submitted to the jury for its consideration the question of the return of empty bags to the plaintiffs by the defendant. The record discloses no evidence, that we have been able to find, showing that the defendant returned any empty bags to the plaintiffs. This prayer also submits to the jury for its consideration the finding of the sum of eighty dollars, alleged to be the "difference between the selling price of twenty tons of soapstone of superior grade and the price at which the defendant was compelled to sell to the Ford Manufacturing Company such superior grade as a further inducement to said Ford Manufacturing Company to accept said three carloads of soapstone." when the only evidence offered upon this question was that offered by the defendant, and all its witnesses placed this difference at forty dollars, this instruction to say the least, was misleading to the jury.

For the errors mentioned the judgment below will be reversed.

*Judgment reversed and new trial awarded.
the appellee to pay the costs both above
and below.*

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Syllabus.

DUGAL LINDSAY AREY vs. LEWIS BAER ET AL.

*Vendor and Purchaser—Adverse Possession of Alley—Title
Free from Reasonable Doubt.*

A private alley once passed through a lot of ground, but for the last fifty years the alley has been built over and occupied exclusively by the plaintiff, as the owner of the lot and his predecessors in title. *Held*, that under these circumstances the plaintiff has such a title by adverse possession to the alley that a purchaser of the lot, including the alley, will be compelled to accept the title under a bill for specific performance, since it is free from reasonable doubt.

Held, further, that even if the alley had once been a public alley, the circumstances of the case would create an estoppel against the public to assert a right to its use.

Decided February 11th, 1910.

Appeal from the Circuit Court of Baltimore City (HEUSLER, J.).

The cause was submitted to the Court on briefs by:

Crain & Hershey, for the appellant.

Myer Rosenbush, for the appellees.

BURKE, J., delivered the opinion of the Court.

It appears from the record that in the year 1833 and prior thereto there was an alley twenty feet wide, beginning at Charles street at a distance of about eighty feet south from the intersection of Charles and Pratt streets in Baltimore City, and running parallel with Pratt street. This alley, which appears to have been a private alley, crossed or bisected the property mentioned in these proceedings, which

was then owned in fee simple by the Baltimore & Ohio Railroad Company. The railroad company did not own the fee in this alley; but under the terms of the grants to it in 1831 and 1833 that company acquired an easement or a right of way in the alley. Whether it originally ran to Light street does not appear, but it probably did. It was known as Rogers alley. In 1855 the Baltimore & Ohio Railroad Company conveyed to Joseph F. Donovan a portion of its property which bounded on this alley. In the description of the lots conveyed to Donovan no mention is made of Rogers alley, a portion of which was embraced in the deed to him. In 1856 Donovan leased a portion of this lot to Christopher C. Hyatt, and in this deed Rogers alley is not mentioned. By mesne conveyances as follows this leasehold estate became and now is vested in the appellees, viz, assignment from Christopher C. Hyatt to John Henderson, dated May 7th, 1877; assignment from John Henderson to James E. Mason and Samuel C. Mason, dated February 1st, 1892; assignment from Alice R. Mason *et al.* to the appellees, dated 21st day of November, 1906. On the 27th of March, 1909, the appellees entered into an agreement with the appellant for the sale of this leasehold estate. This agreement recites that the appellees agrees to sell and the appellant agrees to purchase the building and premises in the City of Baltimore, known as No. 21 and No. 23 East Pratt street, fronting thirty-nine feet six inches, more or less on East Pratt street, and having an even rectangular depth of about one hundred and forty feet, more or less, to the north wall of the property recently erected by the appellees, said lot being free from encumbrances, and with a good and marketable title, subject to an annual ground rent of seven hundred and fifty dollars (\$750) at and for the sum of eighteen thousand five hundred dollars (\$18,500); one thousand dollars was paid in cash as a deposit upon the purchase price, and the balance thereof to be paid in cash within thirty days from the date of the agreement. There are a number of other provisions in the contract; but these

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need not be noticed as they are in no way involved in this case.

The appellant refused to complete the contract, and the vendors filed a bill for specific performance of the contract of sale. The sole reason why the appellant refused to take the property is stated in his answer to be that the appellees "are not possessed of said property by a good and marketable title, and are unable to convey to this defendant such a title for the reason that the property to be conveyed includes within its metes and bounds an alley twenty feet wide, called Rogers alley, which alley passes through the lot claimed to be owned by the complainants, and in which alley the plaintiffs have no title, but on the contrary the title is vested in others."

A replication was filed, and testimony was taken in support of the case made by the bill, but no testimony was offered by the appellant. The lower Court decreed a specific performance of the contract as prayed, and the respondent has brought this appeal. It thus appears that the single question to be decided is: Are the appellees able to convey to the vendor a good and marketable title to the property mentioned in the agreement?

There is no question about the law of the case. That has been settled by innumerable adjudications, and a reference to a few cases in this Court will suffice. "It is the established rule in equity that a purchaser will not be compelled to take a title which is not free from reasonable doubt, and which might in reasonable probability expose him to the hazards of litigation." *Second Univ. Church v. Dugan*, 65 Md. 460. It is said in *Levy v. Iroquois Company*, 80 Md. 300, that: "The question as to what constitutes a marketable title has been, of course, the subject of a good deal of consideration by the Courts, and the books are full of cases in which the matter has been considered. The rule at one time was to decide in every case whether the title was good or bad, and to compel the purchaser to take it as good or dismiss the bill on the ground that it was bad. But as the judgment in such case bound only the parties to the suit, and those claiming under

them, and as the question might be again raised by other parties, and upon matters and evidence not before the Court in the prior suit, it was deemed to be a safer rule not to decide whether the title was absolutely good or absolutely bad, but whether it was so clear and free of doubt, that the Court would compel the purchaser to take it, or whether it was one which the Court would not go so far as to decide it to be bad, but at the same time was the subject of so much doubt that a purchaser ought not to be obliged to accept it. In other words, whatever may be the private opinion of the Court as to the validity of the title, yet if there be a reasonable doubt, either as to a matter of law or matter of fact involved in it, the purchaser will not be enforced to take it. And if the objection is based upon matter of fact, some reasonable ground of evidence must be shown in support of the objection.

"The purchaser has the right, we have said, to demand a title which shall enable him not only to hold his land, but to hold it in peace; and one so clear of doubt as will enable him to sell the property for its fair market value. At the same time it is not every doubt or suggestion, or even threat of contest that will be sufficient; otherwise an assailing purchaser might in every case raise or make such an objection. To avoid this the rule is now well settled, that the doubt must be a reasonable doubt, and one sufficient to cause the chancellor to hesitate, whether the purchaser should be obliged to complete the contract of sale."

This Court has decided in a number of cases that in a proper case specific performance of a contract relating to land will be decreed where the title rests in adversary possession. *Lurman v. Hubner*, 75 Md. 268; *Allen v. Van Bibber*, 89 Md. 436; *Regents of the University of Maryland v. Calvary Church*, 104 Md. 636; *Cook v. Councilman*, 109 Md. 637.

The question, therefore, is whether upon the facts contained in this record there is any reasonable doubt as to the appellees' title to Rogers alley, as it is in that respect alone

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that their title, which rests in adversary possession so far as that alley is concerned, was claimed to be defective.

There is no suggestion that the title of the plaintiff or of his predecessors to that alley has ever been questioned by any one. The evidence is clear that the portion of the alley which formerly crossed the lot in question has been occupied by buildings for more than fifty years, and that undoubted title by adversary possession has been acquired by the appellees and their predecessors in title. The portion of Rogers alley which is now open runs east from Charles street about 150 feet to the west wall of the property now owned by Crook, Horner & Co., which is west of the property sold to the appellant. At the corner of this alley and Charles street is the business house of E. L. Parker & Co. The buildings of this firm run back and bind on Rogers alley for a distance of about 150 feet. Mr. Reese testified that for forty-eight years the property now occupied by Crook-Horner Co., which as we have said is west of the property in question, has been the eastern terminus of the alley, and that during the forty-eight years of his connection with the firm of Parker & Co. he knew that the owners and occupants of the Mason property—and it is under the Masons that the appellees derived their title,—exercised exclusive acts of user and ownership over the alley, and that for forty-eight years he knew the alley never extended any further east than the point mentioned.

Mr. Warfield, who had known the alley for sixty-five years, testified that it never extended further east than it now does. He stated that “the Baltimore & Ohio Railroad Company occupied the premises now called the Mason property on Pratt street, and they had a car yard in the rear; in fact, the Baltimore & Ohio Railroad Company’s building ran back deeper than the alley, and, therefore, the alley could not have gone any further east than that without going over the tracks of the Baltimore & Ohio depot.” He was asked if the lot beginning at the present eastern terminus of the alley had been occupied by buildings, and he answered as follows:

"Yes, sir; my recollection is that it had always been. What makes my recollection so distinct is that there was an old Englishman by the name of Sassfield who had a little shoemaker shop at the corner of the alley, and we had quite a large family, and I had to take the shoes to this shoemaker to be repaired in my childhood days, as I lived on Pratt street, where the Citizens National Bank now is."

This testimony was corroborated by other witnesses. The statute has long since become a complete bar to the assertion by anyone against the appellees of rights in the alley, and if it be conceded that it were a public alley, under the circumstances of the case an equitable estoppel would be created against the public to assert a right to the use of the highway. *Baldwin v. Trimble*, 85 Md. 396.

As the title of the appellees to the property sold is free from any reasonable doubt, we will affirm the decree.

Decree affirmed, each party to pay one-half of the costs above and below.

EUGENE A. RUMSEY ET AL. vs. JOHN L. LIVERS.

Conditional Contract—Performance of Condition Prevented by Promissor—Condition Dispensed With—Promise to Pay Debt When Promissor Collects a Claim—Failure to Collect—Assignment of Claim—Payment of Sub-Contractor Dependent Upon Receipt of Price by Contractor—Instructions—Evidence.

If a party who has promised to pay a sum of money upon the happening of a certain event, prevents that event from taking place, the condition is dispensed with and the promise to pay becomes absolute.

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When a debt exists independently, but as to the time of payment the promise of the debtor is to pay if and when he collects a claim against a third party, he is bound to use due diligence to collect the claim, and if it be not collected by reason of his negligence or fault, the condition is discharged and his promise to pay is enforceable.

If a party agrees to pay a debt due by him when he collects a certain judgment which he holds, his assignment of the judgment to a third party will be treated as dispensing with the condition.

Defendant had a contract to put up an electric light plant for a third party, and employed the plaintiff to do a certain part of the construction work, under a contract by which it was provided that defendant should make payments to the plaintiff when he was paid by the third party, and that if defendant did not receive the contract price, the plaintiff should stand his ratio of loss to the amount of the contract. The third party in question gave to the defendant judgment notes for the whole amount of the contract price upon which judgments were entered. The plaintiff did his part of the work, and the defendant completed his contract with the third party, upon which the whole contract price became due. Only a part of the price was paid, but the defendant refused the plaintiff's request to enforce the judgments and afterwards he assigned them to other persons. In an action to recover the balance due to the plaintiff, *held*, that since the defendant had promised to pay his debt to the plaintiff upon receipt of a fund to which he was entitled and for the payment of which he had obtained enforceable judgments, the defendant was under an implied obligation to utilize the means at his command to enforce the payment by the third party upon which his liability to pay the plaintiff was conditioned.

Held, further, that the plaintiff is entitled to recover in this action if the evidence shows that the judgments could have been enforced by due diligence, but remained uncollected through the negligence of the defendant, or if without the consent of the plaintiff, the defendant elected to refrain from issuing execution, or if he assigned to third persons these judgments in which the plaintiff was interested under his

contract, and which he was entitled to require the defendant to retain and enforce.

Held, further, that the circumstance that the defendant thought that under an execution sale he might himself become the purchaser of the electrical plant, is immaterial.

In the above-mentioned action, prayers, granted at the instance of the plaintiff, instructed the jury that it was the duty of the defendant to enforce payment of the judgments by execution within a reasonable time, and if the defendant did not do so and the amount of the judgments could have been collected, then the plaintiff is entitled to recover his proportionate part of whatever the defendant could have recovered from the third party. Also that if the defendant without the consent of the plaintiff elected not to issue execution but to indulge the third party as to the payment of the judgments, then the defendant is liable to the plaintiff for the amount due under the contract between them. *Held*, that special exceptions to these prayers for lack of evidence to support them, were properly overruled, because there was sufficient evidence in the case to show that the judgments could have been collected in full, and there was also evidence that the defendant did not refrain from issuing execution by inadvertence, but as the result of deliberate decision taken in spite of plaintiff's requests.

Another prayer granted at the instance of the plaintiff instructed the jury that if the defendant assigned to other persons the judgments without the consent of the plaintiff, that constituted a wrongful conversion of the judgments to the extent of the interest of the plaintiff therein, and the plaintiff is entitled to recover his pro rata part. *Held*, that this prayer does not submit a question of law to the jury, since it was uncontradicted that the plaintiff had a substantial interest in the judgments; also that the reference therein to the plaintiff's pro rata part of the judgments, instead of to the value of his interest at the time of the conversion, is immaterial, since the plaintiff's pro rata part of the judgment was exactly equal to the amount due him under his contract.

Md.]

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The relation between the plaintiff and the defendant in this case was not that of partners sharing profits and losses, but that of debtor and creditor.

The plaintiff in an action to recover for his work in constructing an electrical plant, who had testified that he had been an electrical contractor for many years; that he had installed nearly one hundred plants of the character of that referred to in this case, and that he had had occasion to value plants of that description, may be asked what in his judgment, founded upon that experience, was the fair value of the plant in question when he saw it in operation.

In an action to recover a sum of money alleged to be due, evidence that the defendant would have been able or disposed to pay it if a certain event had happened is irrelevant.

Decided February 24th, 1910.

Appeal from the Circuit Court for Cecil County (PEARCE, C. J., ADKINS and HOPPER, JJ.).

The cause was argued before BOYD, C. J., BRISCOE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

Horace M. Rumsey and Frederick T. Haines, for the appellants.

W. T. Warburton and Henry A. Warburton, for the appellee.

URNER, J., delivered the opinion of the Court.

The appellants contracted with the Bolivar Light, Heat and Power Company to furnish and install for it an electric light plant at the village of Bolivar in Westmoreland County, Pennsylvania, and the appellee entered into a sub-contract with the appellants to perform the construction work and provide part of the materials contemplated by the main contract. In consideration of this service the appellants agreed to pay the appellee fifteen hundred dollars. It was provided, however, that payment should be made "in the like manner

of the contract attached when payments are received by the party of the first part" (appellants). The contract thus referred to was that between the appellants and the company. It was further agreed by the appellee, in case of the failure of the appellants to receive the contract price "upon non-payment or from any other cause, to stand his ratio of loss to the amount of contract, and if suit is brought to stand the ratio of expense."

The contract price stipulated to be paid by the company to the appellants was \$11,307.75 payable in designated installments. Immediately upon the execution of the contract, which occurred on March 6th, 1906, the company executed to the appellants three judgment notes aggregating the sum to accrue under the contract, and on the same day judgments by confession for the amounts of the notes were entered in the Court of Common Pleas for Westmoreland County in favor of the appellants in pursuance of the authorization in the notes for that purpose.

The appellee proceeded to the performance of his sub-contract and completed the work on July 15th, 1906. Payments to the amount of \$2,181.13, the last being on September 9th, 1906, were made by the company to the appellants on account of their contract. The appellee received a due proportion of these sums according to the ratio which his claim against the appellants bore to their claim against the company. His total receipts amounted to \$274.82. He was chargeable also with \$258.75 for poles which he was to furnish but which the company itself supplied and for which it was credited by the appellants. Independently of these items the appellee's claim under his sub-contract remains unpaid.

The plant was put in operation when the appellee completed his work. The contract had then been fully performed on the part of the contractor, the various instalments of the contract price were then payable, the judgment notes were all matured and the judgments, constituting first liens on the company's property, were enforceable. No execution was ever issued on the judgments by the appellant firm, but on

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June 17th, 1907, immediately after they received a letter from the appellee stating that he had placed his claim in the hands of his attorney, they assigned the judgments to the Rumsey Electric Company, limited, a separate partnership composed of the appellants and others and the assignees issued execution on October 31st, 1908. It does not appear from the record that the execution has ever been pressed to a sale of the property covered by the judgment liens. In the meantime, prior to the assignment of the judgments, the appellee had written the appellants repeatedly urging settlement with the company and the payment of his claim. He brought the present suit as a foreign attachment proceeding on December 10th, 1907. The appellants, as defendants below, appeared to the short note case, the trial of which resulted in a verdict and judgment for the appellee for the balance of his claim and interest.

A demurrer filed by the defendants to the whole, and each of the two counts, of the amended declaration presents the primary question for our consideration.

The first count declares in common form for money payable for work and labor done and materials furnished. The second alleges that the contract and sub-contract to which we have referred and then avers that the plaintiff fully performed his contract according to its terms and that the work so done and the materials so furnished were accepted by the defendants as a complete performance of the contract; that by its terms he was entitled to be paid in the like manner in which the defendants were to receive payment from the company under their contract with it; and that from time to time the defendants paid to him on account of his contract the sum of \$533.57, leaving a balance due him of \$966.43, which balance the defendants by the exercise of reasonable diligence could have long since collected by the execution upon certain judgments given to them by the company for the whole amount of their claim against it, which included the sum due by them to the plaintiff, but that the defendants have failed and refused to take steps to enforce and collect

the judgments by execution, and have failed and refused to exercise due and reasonable diligence to collect the amount of the judgments, but on the contrary, without the consent of the plaintiff, have elected to defer and delay the collection of the judgments and to give unreasonable indulgence to the company upon the judgments, which by the exercise of reasonable diligence the defendants could have collected, to the great loss and injury of the plaintiff, etc.

We have no difficulty in approving the action of the Court below in overruling the demurrer, as we are clearly of the opinion that the allegations in question set forth a good cause of action. The full performance of the sub-contract by the plaintiff and the acceptance of its results by the defendants undoubtedly created the relation of creditor and debtor between the parties; but as the agreement contained the unusual provision that the debt should be due when payments were received by the defendants under the principal contract, it was essential to the plaintiff's recovery that he should aver and prove not only the existence of the debt but also that it had become payable either on account of the actual receipt by the defendants of the sums due them from the company or as a result of such conduct on the part of the defendants as would preclude them from relying upon the provisions suspending the maturity of the plaintiff's claim. As the defendants agreed to pay their indebtedness to the plaintiff upon the receipt by them of a fund to which they were entitled and to secure the payment of which they had obtained judgments which were enforceable, they must, upon the plainest principles of justice, to be held to have incurred the implied obligation to the plaintiff to utilize the means of their command for the performance of the stipulated condition precedent. The payment of the compensation he had earned from the defendants could not be perpetually postponed merely because the company refrained from paying its debt to the defendants or because they omitted or refused to enforce its collection. They could insist upon their right to withhold payment from the plaintiff until their receipt of

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funds from the company only by asserting their right under their contract with the company to the payment of the sums to which they were entitled, especially in view of the fact that this contract was specifically referred to in the sub-contract in relation to the manner in which the payments were to be received. It is manifest from the provision for an apportionment of the costs of suit against the company that the active prosecution of the defendants' rights under the original contract was contemplated, and the plaintiff was entitled to rely upon such action as a condition of his agreement to have the payment of his claim deferred. If the defendants committed a breach of this condition in consequence either of neglect or affirmative election, both of which are charged in the declaration, we see no reason why the stipulation in question should still remain available to them as a ground for postponing the payment of the plaintiff's demand.

In *Vermont Marble Co. v. Mann*; 36 Vt. 697, the plaintiff furnished for the defendant certain marble for use by the latter in the performance of a contract with the United States Government. It was agreed that the plaintiff should be paid when the defendant received his pay under the contract. Objection to the plaintiff's recovery was made on the ground that the term of credit had not expired at the commencement of the suit. In dealing with this situation and sustaining the plaintiff's right to recover the Court said: "If the defendant did any act or entered into any new arrangement which had the effect to postpone the receipt of the money from the government, the plaintiff's claim might become payable before the actual receipt of the money by the defendant."

The Supreme Court of Massachusetts, in *White v. Snell*. 26 Mass. 16, held that a promise by the defendant for value received to pay to the plaintiff a sum of money if and when the defendant shall collect his demands against a third person implies that the defendant will use due diligence to collect such demands; and in an action upon such promise it is not necessary to prove that the plaintiff requested the defendant to make collection. "If," said the Court, "the de-

fendant had power to neglect looking up those demands and thus to get rid of his contract, the law would aid him in the commission of a fraud. Negligence shows a breach of his contract, as much so as a refusal to pay the plaintiff in case the demands had been collected."

In *Crooker v. Holmes*, 65 Maine, 195, a second mortgagee, under a mortgage securing a note payable when the mortgagor should sell the property on which he was then living, filed a bill to redeem the mortgaged land from the lien of the first mortgage. The mortgagors's equity of redemption had, subsequently to the making of the note, been sold under execution for another debt. It was urged against the suit to redeem that the note secured by the second mortgage was not payable because the maker had not sold, and could not sell, the property. The Court said: "The debt is due *in presenti*. Its payment is postponed to a future time, but the debt none the less exists. The debt is absolute, the time of its payment indefinite * * * If a party puts it out of his power to perform his contract, his liability at once accrues. It matters not whether by his neglect this be so, or whether it be intentional." The indebtedness was, therefore, held to be payable notwithstanding the condition precedent for its payment had not been fulfilled.

The general principle of the cases to which we have thus particularly referred is recognized also in *Nunez v. Dautel*, 19 Wall. 560; *Sears v. Wright*, 24 Me. 278; *Hicks v. Shouse*, 17 B. Mon. (Ky.) 483; *Noland v. Bull*, 24 Ore. 479; *Williston v. Perkins*, 51 Cal. 554; *Lee v. Decker*, 6 Abb. Prac. (N. S.) 392.

In discussing the questions presented by the demurrer we have had in view also those raised by the exceptions taken by the appellants to the rulings of the Court below in granting and refusing certain instructions to the jury.

The plaintiff offered three, and the defendants eleven prayers. All of the plaintiff's prayers and the defendants' second and tenth prayers were granted, while the remainder of the defendants' prayers were rejected.

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The plaintiff's first prayer asked an instruction to the effect that if the defendants took the judgment notes and obtained the judgments to which reference has been made, and that their contract with the company was fully performed in July, 1906, and that the judgments were then due and payable, then within a reasonable time thereafter it was the duty of the defendants to proceed to enforce payment thereof by execution, provided the jury should find that any part of the judgments could have been realized upon execution; and if the jury should find from the evidence that the defendants did not proceed to collect by execution the amount of the judgments, then the plaintiff is entitled to recover from the defendants his proportionate part of whatever the jury should find might have been recovered by the defendants under such execution, with interest in the discretion of the jury, from the time when the jury should find they could have collected the amount of the judgments.

The second prayer of the plaintiff proceeded upon the theory that if the defendants, without the consent of the plaintiff, elected that they would not issue execution, but would indulge the company in the payment of the judgments, and continued to indulge them without the plaintiff's consent, then the defendants thereby made themselves liable to pay to the plaintiff the amount which the jury should find from the evidence was then due by the defendants to the plaintiff under the contract between them, with interest from that time, in the discretion of the jury.

By the plaintiff's third prayer the Court was asked to instruct the jury that if they should find that the assignment of the judgments by the defendants to the Rumsey Electric Company, the separate partnership heretofore mentioned, was made without the consent of the plaintiff, then such assignment constituted a wrongful conversion by the defendants of the judgments to the extent of the interest of the plaintiff therein, and the plaintiff is entitled to recover his *pro rata* part of the balance of the judgments as shown by the evidence with interest in the discretion of the jury.

It is evident that the first prayer is predicated upon the idea, of mere passive neglect to enforce the payment of the judgments entered under the original contract, while the second and third prayers are based upon the theories, respectively, of an affirmative choice not to enforce payment and of positive change by the defendants of the plaintiff's relation to the instrumentality through which the payment was to be obtained. The theory of neglect, as applied in the first prayer, assumes the necessity of showing that the judgments might have been collected by due diligence, while the theory of deliberate action in altering the situation upon which the plaintiff had a right to rely, as presented in the second and third prayers, assumes a breach of the suspensory condition imposed upon the payment of the debt and its consequent release from that limitation, thus rendering it due and payable regardless of the collectibility of the judgments.

If the proceeds of the judgments, or of the contract under which they were given, had been the primary subject-matter of the agreement between the plaintiff and defendants, there could not well be a recovery unless the proceeds were shown to have been available. In this case, however, we are dealing with a debt which was created and now exists under a contract distinct from that under which the judgments were procured and which refers to the latter contract only for the purpose of regulating the time of payment. The plaintiff here is not suing for money which the defendants should and might have collected for him under the judgments in question, but he is demanding the amount which the defendants expressly agreed to pay him, and is insisting that their course of action has violated the provision suspending the payment of his claim and has left it in the same position it would have held if the time of payment had not been mentioned in the agreement; in which event, of course, it would have been due upon the performance by him of his contractual duty.

It seems to us, therefore, in the light of the principles and authorities to which we have referred, that the plaintiff was entitled to recover if the jury believed from the evidence that

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the judgments might have been enforced by due diligence but remained uncollected through the negligence of the defendants, or that, without the consent of the plaintiff, they elected to refrain from issuing execution, or assigned to a third party the judgments in which the plaintiff was interested under the terms of his contract and which he was entitled to have the defendants retain, control and enforce. We are accordingly of the opinion that the plaintiff's prayers were properly granted. In reaching this conclusion we have not overlooked the fact that the third prayer is open to the technical objection that it is directed to the recovery of the plaintiff's *pro rata* part of the balance of the judgments upon the theory of a conversion by the defendants of the plaintiff's interest in them, without reference to the *value* of his interest at the time of conversion, which would ordinarily be the measure of recovery upon that theory. But as the act of the defendants in assigning the judgments to a third party, without the plaintiff's consent, if found by the jury, constituted a breach of the suspensory condition and entitled the plaintiff to payment of his claim without further delay and as the plaintiff's *pro rata* part of the judgments at their face value was exactly equal to the amount due him under his contract, we think that the defect in the prayer to which we have alluded was immaterial and harmless.

There were special exceptions filed by the defendants to the plaintiff's first and second prayers upon the ground that there was no evidence to prove what sum might have been collected by execution on the judgments, and to the second prayer for the further reason assigned that there was no evidence that the defendants without the consent of the plaintiff elected that they would not issue execution, and to the third prayer because it was supposed to submit a question of law to the jury, to wit, whether the plaintiff had any interest in the judgments, and because there was claimed to be no evidence that the plaintiff held any such interest.

In reference to the first ground of exception mentioned it is sufficient to say that there was evidence that the plant of

the Bolivar Company, upon which the judgments were a lien, was worth about \$20,000, that the assured income from the plant was about \$4,000 annually, that the debts of the company, independently of these judgments, amounted to \$8,000; that the balance due on the judgments was \$8,857.99, and that after they were obtained the defendants gave the company additional credit and received considerable payments from it upon an open account. From this evidence the jury could readily find that the judgments might have been collected in full.

There was evidence tending to show that the defendants refrained from issuing execution not because of inadvertence but as a result of deliberate decision, and that this was done in disregard of the plaintiff's frequent and urgent requests that action be taken to procure a settlement. It is obvious, therefore, that the further ground of exception to the second prayer cannot be sustained.

The third prayer did not, as suggested by the exception, submit a question of law to the jury. It is clear that the plaintiff had a substantial interest in the judgments under the terms of the agreement, and one of the defendants testified explicitly that the plaintiff "was interested in them to the extent of what he was to get under his contract."

The defendants' rejected prayers can be discussed briefly. Their first prayer sought to withdraw the case from the jury. In view of the evidence to which we have referred it could not properly have been granted.

The third prayer sought to have the jury instructed in effect that by the true construction of the contract all payments received by the defendants from the company were to be divided between the plaintiff and the defendants in the proportion that the claim of the plaintiff bore to the claim of the defendants, and if the jury should find that the plaintiff had received his proportion of all payments received by the defendants, he could not recover. By the fourth prayer it was asserted that according to the true construction of the contract the plaintiff had no interest in the judgment notes men-

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tioned in evidence and that he could not recover on account of the failure of the defendants to collect the notes. The fifth was to the effect that there was no evidence sufficient to show that the defendants could have collected the judgment notes prior to the suit by the use of reasonable diligence. It was proposed by the sixth prayer to instruct the jury that though they should find that the judgments were assigned, yet they could not find for the plaintiff unless they further found that the assignment of the judgments prevented the payment of the debt due from the company to the defendants on the contracts offered in evidence, under the pleadings. The eighth was based upon the theory that if the plaintiff did not request the defendants to enforce the collection of the judgments, then he could not recover because the defendants did not enforce the judgments by execution. The eleventh was to the effect that the plaintiff had no interest in the judgment notes and could not recover on account of their assignment under the pleadings in this case.

It is apparent that these prayers are all in conflict with the principles we have found to be applicable to this case, and they were properly rejected.

The defendants' seventh prayer was, in substance, that if the jury should find that the judgments were assigned to the separate partnership merely as a collecting agent for the defendants, then the assignment did not render the defendants liable in this case. Evidence was offered, but not admitted, to prove that the assignment, which was absolute in its terms, was made for the purpose of collection. If such evidence had been admitted it would not have been material, in the view we have taken of the case. It appears beyond contradiction that the judgments were assigned without the consent of the plaintiff and that execution was not issued until October 31st, 1908, about sixteen months after the assignment and nearly a year after the institution of this suit, and there is nothing to indicate that even then it was prosecuted to a sale. The plaintiff was interested in the judgments as the instrumentality for realizing the fund whose collection

was the condition precedent to the maturing of his claim, and the transfer of the judgments to a third party without his consent, under the circumstances shown by the record, was a breach of the condition and had the effect of relieving the indebtedness of that restriction upon its payment. There was no error, therefore, in refusing this instruction.

By the defendants' ninth prayer the jury were sought to be instructed that by the true construction of the contracts the plaintiff and defendants were virtually partners sharing the profits and losses in the proportions provided in the contracts and that, therefore, the plaintiff could not recover in this form of action. We find nothing in the contracts or the record to support the theory of this prayer. The defendants' express obligation was to pay the plaintiff a designated sum of money, with a postponement of the time of payment until the collection of a certain fund, and the relation of the parties was simply and exclusively that of debtor and creditor.

There were seven exceptions taken by the defendants during the course of the trial to rulings upon the admissibility of evidence.

The first was to the admission of testimony by the plaintiff, as a witness in his own behalf, who after testifying that he had been an electrical contractor for many years, that he had installed nearly a hundred plants of the character of that at Bolivar, and that he had occasion to value plants of that description, was asked what, in his judgment founded upon that knowledge and experience, was a fair and reasonable value of the plant in question when he saw it in operation. His reply was that he would estimate it to be worth about \$20,000. We think this evidence was clearly admissible as tending to show, by the valuation of a qualified expert, that the judgments were collectible.

The second and third exceptions relate to the exclusion of testimony of one of the defendants offered to be given to the effect that if any further sums had been received from the Bolivar Company they would have been prepared and able to pay the plaintiff his proportion. This evidence was ob-

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viously immaterial and irrelevant, as the questions in issue related to the defendants' duty and liability, and not to their disposition or ability, to pay their debt to the plaintiff after the condition precedent to its payment had been by them performed or violated.

It appears from the fourth and fifth exceptions that it was proposed by the defendants to prove that their firm and the separate partnership to which the judgments were assigned were solvent at the time of the assignment. The plaintiff's objection to this offer was properly sustained as the evidence sought to be introduced was entirely irrelevant to any issue in the case.

The sixth exception was taken to the action of the Court below in striking out, on motion of the plaintiff, one of the reasons given by counsel for the defendants in his testimony for not issuing execution on the judgments more promptly, the reason so excluded being that his clients instructed him that they did not want to purchase the plant themselves. We think this reason for inaction in reference to enforcing the judgments was inconclusive and immaterial as affecting the plaintiff's rights in the premises, and it was properly excluded.

The seventh exception was to the exclusion of oral evidence tending to show that the assignment of the judgments while absolute in form was really made for collection. It is not necessary for us to pass upon the question whether parol evidence would be admissible for the purpose indicated, as we have already held in considering the defendants' seventh prayer that this evidence, under the circumstances shown by the record, was immaterial. It may be noted in this connection that one of the defendants testified that the transfer of the judgments was made on account of anticipated litigation.

The argument on behalf of the appellants was largely directed to the propositions that the judgment notes were merely collateral to the debt due from the Bolivar Company under the main contract, that there was no merger of the debt in the

judgments, and that, therefore, the plaintiff had no interest in them entitling him to complain of their assignment; but it is obvious from the view we have taken of the case that these considerations do not affect our conclusions.

We have found no reversible error in the rulings of the Court below and its judgment will be affirmed.

Judgment affirmed with costs.

MAYOR AND CITY COUNCIL OF HAVRE DE
GRACE vs. MARY ELMA FLETCHER.

Rules of Court of Appeals as to Records and Briefs—Sufficiency of Declaration in Action Against Municipal Corporation for Its Negligent Failure to Abate Dangerous Nuisance.

An appeal will not be dismissed merely because the appellant failed to pay the cost of printing the record within ten days after receipt of notice from the Clerk of the Court of Appeals, as is required by Rule 34, if the record was in fact printed and ready when the cause was called for argument in regular order.

An appeal will not be dismissed on account of the failure of the appellant to furnish copies of his brief to opposing counsel three days before the case is called for argument, as is required by Rule 36 of this Court. That rule prescribes a different penalty for failure to comply with it.

In an action against a municipal corporation, the declaration alleged that it was the duty of the defendant to use reasonable care to keep the public streets and sidewalks of the city in a safe condition for public travel and to prevent and remove all nuisances therefrom; that, neglecting said duty, defendant did on a certain day and for a long time prior thereto, permit designated persons to stack beer kegs to a height of about eight feet on or near one of the public streets in

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such a negligent manner as to be dangerous to passers-by on that street; that on said day, while the infant plaintiff was passing along the street and using due care, one of the said beer kegs, so negligently stacked, fell upon her, causing injuries which necessitated the amputation of one of her legs. *Held*, upon demurrer, that this declaration states a good cause of action.

Decided February 11th, 1910.

Appeal from the Circuit Court for Harford County where there was a judgment on verdict for the plaintiff for \$9,000.

The cause was submitted to the Court on briefs by:

James J. Archer and *P. L. Hopper*, for the appellant.

Arthur L. Jackson, Fahey & Brown and *Thomas H. Robinson*, for the appellee.

PEARCE, J., delivered the opinion of the Court.

A motion to dismiss this appeal has been filed upon the ground that the cost of printing the transcript of the record was not paid by the appellant or its counsel within ten days from the receipt of the notice from the clerk of this Court, stating the amount of the cost of printing the same, and that the time for the said payment was not extended by agreement of counsel nor by order of this Court, as provided by Rule 34 of this Court. The transcript of the record was received by the clerk of this Court on October 15th, 1909, and a bill of the cost of printing the same was sent by him to the appellant's counsel on October 20th, 1909, and received by him in due course of mail, but the costs were not paid until December 20th, 1909, and the case was called in its due course on the docket of this Court, and was submitted on briefs January 21st, 1910.

The object of this rule is primarily to secure prompt payment of the cost of printing the record in order that no un-

necessary delay in the argument of cases in their regular order may be occasioned for want of the printed record, and secondarily, in order that counsel may be provided with printed copies of the record in due time for convenient preparation and exchange of their briefs as provided by Rule 36. There is no provision in Rule 34 that an appeal shall be dismissed for non-compliance with the rule and no penalty of any character is provided for non-compliance. The record was ready when the case was called, as were the printed briefs of counsel, on both sides. No delay in the business of the Court was occasioned by the failure to pay the costs of printing the record within ten days after notice of the amount of the costs, and an inspection of the character of the record in this case shows that it could not have been necessary to aid in preparing the briefs. No inconvenience therefore has been caused to any one in the matter. Under such circumstances it would operate as an injustice to deprive this defendant of the right of appeal.

Rule 36, sec. 2, which requires counsel to furnish copies of their briefs to opposing counsel not less than three days before the case is called for argument, provides, that upon failure of either party to comply with that section of the rule, the one not in default may have the case *continued* at the cost of the other party, or may proceed with the oral argument and file within six days thereafter, a printed argument in reply to the brief on the other side, the cost of printing the same to be taxed against and recovered from the party in default; but it does not require or authorize dismissal of the appeal for such default.

In a case like the present, where it should be made to appear that the want of the record interfered with the preparation of the briefs, or prevented their exchange before the case was called, it would be ground, either for continuance upon the application of the party not in default, or for the exercise of the alternative privilege provided by Rule 36, but the motion to dismiss in this case must be overruled.

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The only question presented by this record arises upon the action of the Circuit Court for Harford County in overruling the defendant's demurrer to the plaintiff's second amended declaration, which we will transcribe in full.

Second Amended Declaration.

State of Maryland, Harford County, Sect.:

Mary Elma Fletcher, infant under the age of twenty-one years by J. Archer Fletcher, her father and next friend, by Michael H. Fahey and A. Freeborn Brown, attorneys, sues the Mayor and City Council of Havre de Grace, a corporation duly incorporated under the laws of the State of Maryland, John H. Saricks, Mary A. Saricks and George H. Saricks.

First. For that the defendant the Mayor and City Council of Havre de Grace aforesaid is a municipal corporation of the State of Maryland, charged by the law with the duty of caring for and maintaining the streets, alleys and sidewalks of the City of Havre de Grace and of keeping the same fit and safe for public travel, and charged with the duty to remove and abate *all* nuisances and obstructions on said streets, alleys and sidewalks, and it was at the time of the injuries hereinafter mentioned and is now the duty of said body corporate to use reasonable care and caution to keep all of the public streets, alleys and sidewalks in safe condition for public travel and to prevent and remove all nuisances therefrom (or on or from any lots within the limits of the city) and disregarding and neglecting the said duty and obligation imposed upon it the said defendant the Mayor and City Council of Havre de Grace did on the 26th day of June, 1908, and for a long time prior thereto permit the said John H. Saricks, Mary A. Saricks and George H. Saricks to stack beer kegs on or near the side of Water street, one of the public traveled streets of said city, near or at its intersection with Otsego street in such a manner as to be dangerous to persons passing along and upon said street and failed and neglected to remove the same and failed and neglected to require the said John H. Saricks, Mary A. Saricks and

George H. Saricks to remove the said beer kegs so stacked by them on or near the side of said street, and that on the 26th day of June, 1908, the date above mentioned these beer kegs were stacked on or near the side of Water street at or near its intersection with Otsego street to the height of about eight feet by the said John H. Saricks, Mary A. Saricks and George H. Saricks, and that on said day and date while the said infant plaintiff was passing along and upon the sidewalk of said Water street at or near its intersection with Otsego street where the public using said street travel at all times, and while said infant plaintiff was using due care, one of said beer kegs fell upon said infant plaintiff, knocking her down and injuring her left leg so seriously that as a result of said injury said left leg had to be amputated below the knee and other injuries were inflicted upon her as a result of which said infant plaintiff suffered great pain and is permanently injured.

Second. And for that the defendant the Mayor and City Council of Havre de Grace aforesaid is a municipal corporation of the State of Maryland, charged by the law with the duty of caring for and maintaining the streets, alleys and sidewalks of the City of Havre de Grace and of keeping the same fit and safe for public travel, and charged with the duty to remove and abate all nuisances and obstructions on said streets, alleys and sidewalks, or on or from any lot within the limits of the city, and it was at the time of the injuries hereinafter mentioned and is now the duty of said body corporate to use reasonable care and caution to keep all of the public streets, alleys and sidewalks in safe condition for public travel and to prevent and remove all nuisances therefrom (or on or from any lot within the limits of the city) and disregarding and neglecting said duty and obligation imposed upon it the said defendant, the Mayor and City Council of Havre de Grace, did on the 26th day of June, 1908. and for a long time prior thereto permit the said John H. Saricks, Mary A. Saricks and George H. Saricks, who conducted a hotel known as Saricks' Hotel, on the northwest corner of

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Water and Otsego streets in the said city of Havre de Grace, it being the same property described in a deed from Lewis K. Herbst to the said Mary A. Saricks, dated the 19th day of November, 1881, and recorded among the Land Records of Harford County, in Liber A. L. J. No. 49, folio 19, to stack beer kegs on or near said Water street, one of the public traveled streets of said city, at or near its intersection with Otsego street and near said hotel, in such a negligent manner as to be dangerous to persons passing along and upon said street and failed and neglected to remove the same and failed and neglected to require the said John H. Saricks, Mary A. Saricks and George H. Saricks to remove the said beer kegs so negligently stacked by them on said street, and that on the 26th day of June, 1908, the date above mentioned, a number of beer kegs were negligently stacked on or near said Water street at or near its intersection with Otsego street and near the hotel so conducted by the said John H. Saricks, Mary A. Saricks and George H. Saricks to the height of about eight feet by the said John H. Saricks, Mary A. Saricks and George H. Saricks or their agents and servants and that on the said day and date while the said infant plaintiff was passing along and upon the sidewalk on said Water street and using due care, at a point where the public using said street travel at all times, one of the said beer kegs fell, by reason of the negligent and dangerous manner in which they had been piled, upon said infant plaintiff, knocking her down, and injuring her left leg so seriously, that as a result of her said injury the said left leg of the infant plaintiff had to be amputated below the knee, and other injuries were inflicted upon her, and as a result of which said injuries, said infant plaintiff has suffered great pain and is permanently injured. and that the said infant plaintiff was using due care and caution, and was not guilty of negligence directly contributing to the happening of the accident. And the plaintiff claims \$25,000 damages.

In *Maenner v. Carroll*. 46 Md. 212, JUDGE ALVEY stated the essential averments of a declaration in an action for neg-

ligence, in language of singular clearness and brevity. He said: "To constitute a good cause of action, in a case of this nature, there should be stated a right on the part of the plaintiff, a duty on the part of the defendants in respect to that right, and a breach of that duty by the defendants, whereby the plaintiff has suffered injury."

The declaration in the case before us, in both counts, alleges that the defendant is a municipal corporation of the State of Maryland, and then proceeds to aver that it was charged by law with the *duty* of caring for its streets, alleys and sidewalks and of keeping the same fit and safe for public travel, and that it was charged with the duty to remove and abate all nuisances and obstructions on said streets, alleys and sidewalks, or on or from any lots within the limits of said city. In averring this *duty* the declaration recites the exact language of the charter conferring *power* upon the defendant, and it is a familiar principle "that when a statute confers power upon a corporation to be exercised for the public good, the exercise of the power is not merely discretionary, but imperative, and the words 'power and authority,' in such case, may be construed *duty* and obligation." There was therefore a duty on the part of the defendant under its charter to prevent and remove all nuisances on its streets and sidewalks, or on or from any lots within its limits.

The first count further avers that the defendant on June 26th, 1908, and for a long time before, neglecting the said duty imposed upon it, permitted certain persons who conducted a hotel in said city to stack beer kegs on or near the side of one of the travelled streets of the city in such manner as to be dangerous to persons using said street, and neglected either to remove said beer kegs or to require the persons conducting the hotel to remove them, and that on the day mentioned, while the infant plaintiff was walking on said street and using due care, one of said kegs fell upon her and so seriously injured her as to require the amputation of one of her legs. The second count differs but slightly in phrase-

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ology from the first count. Indeed the only difference is that the hotel property is minutely described, and that the defendant permitted said beer kegs to be stacked in such a *negligent* manner as to be dangerous to passers by, while the first count charged that they were stacked in such a manner as to be dangerous to passers by. The appellant's counsel in their brief seek to argue that no question of negligence is presented by the language, of this declaration, but we cannot agree with this contention. We think the allegation of the first count that the kegs were permitted to be stacked "in such a manner as to be dangerous to passers by" is a sufficient averment of negligence on the part of the defendant; but even if it could be held otherwise, the averment of the second count that the defendant permitted the beer kegs to be so *negligently* stacked as to be dangerous to passers by, is a positive and direct averment of negligence on the part of the defendant, and as the demurrer was to the whole declaration, it could not avail even if the first count were held defective.

There is a strong analogy between this case and *DeFord's Case*, 30 Md. 179, where the nuisance charged was the erection of a defective wall upon the premises of DeFord which fell upon Mrs. Keyser as she was passing on the street and caused her death. In that case JUDGE ALVEY said: "The wall was immediately fronting on a public street in a large city, and if the testimony offered on the part of the plaintiff be true it was constructed in a most defective and dangerous manner; so much so, that it excited the alarm and apprehension of hundreds of people as they passed and caused them to avoid the pavement in its immediate front. If this be so, it certainly constituted a nuisance, for which DeFord would be liable."

Here the demurrer admits the kegs were so negligently stacked as to be dangerous to passers by; and the negligent stacking of beer kegs, lumber or any other material on or near the line of a street is obviously as much a nuisance as the erection or maintenance of a defective wall. See also

Murray v. McShane, 52 Md. 224, where the *DeFord Case* was fully approved.

There is no difference between the liability of a municipal corporation with such a charter as the defendant has, and that of an individual. In *Mayor and City Council v. Marriott*, 9 Md. 174, JUDGE MASON said, speaking of similar language in the charter of Baltimore City: "We are of opinion that the effect of the provision in the statute just cited, was to place the corporation of Baltimore, in regard to their obligations to prevent and remove nuisances, upon the same footing which is held by individuals and private corporations."

The right of the plaintiff to use the public streets for the purposes for which they are constructed and maintained was not, and could not be, questioned, and the demurrer admits the averment of the narr. that she was using due care while passing the spot where she was injured, and also that the injury she received was the result of the fall of one of the kegs negligently piled as charged.

The duty neglected by the defendant in this case was a duty to the plaintiff in respect to the right which as a member of the public she enjoyed in the free and safe use of the public streets, and the special and peculiar damages she has suffered by reason of the breach of duty by the defendant entitled her to maintain a special action against the defendant.

The demurrer was properly overruled, and the judgment appealed from must therefore be affirmed.

Judgment affirmed, with costs to the appellee above and below.

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Syllabus.

THE PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY *vs.* MICHAEL STUMPO.

Appeal—Summons and Severance—Liability of Railroad Company for Assault Made by Its Special Policeman—Officer Not Acting Within Scope of His Employment.

When one of the two defendants in a joint judgment has not appealed, and the other defendant, who does appeal, applies for a writ of summons and severance, which is returned *non est* as to the other defendant, the better practice is for the appellant to support then his application for a severance by affidavits showing what efforts have been made to find the other defendant, or to have him unite in the appeal. If he can be found outside of the State, the Court may authorize notice of the application for severance to be served on him where found, and if his whereabouts cannot be ascertained, the Court can grant a severance.

The record in this case showed that A. and B., the two defendants against whom a joint judgment was rendered, filed an order for an appeal. Afterwards A. applied for a writ of summons and severance on the theory that he alone had taken the appeal. Two returns of *non est* as to B. were made to the writ. At the argument of the appeal B. did not appear, and no brief was filed by him. *Held*, that no injury can be done to B. by granting a severance, since, if he did enter an appeal he was in default, and if he did not, the time to do so has expired.

When a special police officer employed by a railway company makes an assault upon a person or arrests him on the premises of the company, it is generally a question for the jury whether the officer was at the time acting within the scope of his employment so as to render the company liable for an unjustifiable assault or arrest. But when an assault or arrest is made by an employee not on the premises of the company, and not for an offense of which the company had a right to

complain, the Court will determine as matter of law, that the employee was not acting within the scope of his employment. One H. was appointed by the Governor a special policeman for the protection of the property of a railway company and for the preservation of peace on its premises, and he had made arrests of men for stealing rides on freight trains and of persons who were disorderly on the premises of the railway company. The plaintiff, who had been employed by the company, was discharged by a track foreman. A few days afterwards, H. was informed that the plaintiff had made threats against the foreman and was lying in wait to do him harm. Thereupon H. assaulted the plaintiff on a public highway, beat him severely and arrested him on the charge of carrying concealed weapons. Plaintiff had done nothing that would justify his arrest by the company or its agents, and was not on the premises of the company at the time of the arrest. In an action to recover damages therefor, *held*, that under these circumstances it was necessary, in order to recover against the railway company, for the plaintiff to show that the assault and arrest were made by its authority or were within the scope of the employment of H., and since there was no evidence to that effect, the plaintiff was not entitled to recover against the railway company.

Decided February 24th, 1910.

Appeal from the Circuit Court for Cecil County (PEARCE, C. J., ADKINS and HOPPER, JJ.).

The cause was argued before BOYD, C. J.; BRISCOE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

Frederick T. Haines (with whom was *L. Marshall Haines* on the brief), for the appellant.

Joshua Clayton and *Frank B. Evans*, for the appellee.

BOYD, C. J., delivered the opinion of the Court.

A judgment was obtained in the lower Court against the Philadelphia, Baltimore and Washington Railroad Company

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and one Hugh G. House in an action for assault and battery. The case has been conducted in this Court as if the railroad company was the only appellant, although the docket entry in the record is: "August 2nd, 1909, *the defendants* filed an order of appeal, and an affidavit that the appeal was not taken for delay. And also on the same date, an appeal bond was approved, filed and recorded." But application was made by the railroad company for a writ of summons and severance on the theory that it alone had taken the appeal, and we suppose that was the case—although the order for appeal, the affidavit and bond are not in the record. An order was passed requiring House to show cause why that writ should not be granted, but the sheriff made the return of *non est*, and on two renewals of that order similar returns were made.

No motion to dismiss the appeal was made by the appellee, and no objection to proceeding with the argument was suggested. If objection had been made when the case was called, and we had concluded that it was necessary or proper, we could have postponed the hearing until further efforts were made to have the copy of the order served on House, as apparently the railroad company had done all that could be required of it before the case was reached in the regular call of the docket.

We will add that if objection is made in this Court to entertaining an appeal on the ground that all parties to a joint-judgment have not united in the appeal, and such an order as we passed cannot be served, because the party not appealing cannot be found, the better practice is for the appellant to *then* support his application for a severance by affidavits tending to show what efforts had been made to find the other party, or to have him unite in the appeal. If he can be found, but is outside of the State, the Court can authorize notice of the application for severance to be served on him where found, and if his whereabouts cannot be ascertained, this Court would not hesitate to grant a severance, after due effort had been made to locate him—at least after the time allowed for entering an appeal had expired. If any

other practice be adopted, a party who is financially responsible might be deprived of the benefit of an appeal by the collusion, indifference or illwill of the other party against whom the judgment is rendered. As under our statute an appeal from a judgment at law must be entered within two months, it would be useless to delay the case beyond that time in order to have service on the one who did not unite in the appeal, if it be shown that due effort had been made to have him served. In *Mottu v. Primrose*, 23 Md. 482, the appeal was taken by five out of six defendants against whom judgment had been rendered. A motion to dismiss was made on account of the non-joinder of the other defendant. Our predecessors held that, upon motion of the five appellants for a writ of summons and severance against the non-joining defendant, the writ should issue out of the appellate Court; the motion to dismiss was overruled and the writ ordered. In *Oldenburg v. Dorsey*, 102 Md. 172, we dismissed the appeal, as no application for a writ of summons and severance was made, and being of the opinion that the rulings below were correct, we did not deem it necessary to postpone the case until such application could be made. In this case, House did not appear in person or by attorney in this Court, and no brief was filed for him, and hence he was in default if he did enter an appeal, and, if he did not, the time to do so has long since expired. No injury therefore can be done him by granting a severance, and as the time for taking an appeal has expired the appellee cannot be subjected to the annoyance of a second appeal. We will therefore pass on the merits of the case, as if a formal order of severance had already been entered of record—deeming the judgment we will enter sufficient, under the circumstances.

The facts which we regard as material and relevant are as follows: House was appointed by the Governor, to use the language of his commission, “a policeman for the protection of the property of the Northern Central Railway Company, the Philadelphia, Baltimore and Washington Railroad Company, and the Union Railroad Company of Baltimore, and

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for the preservation of peace and good order on the premises of the said company in this State," etc. The plaintiff lived some distance from Perryville, and had worked for the appellant company until about the middle of March, 1908, when he was put off by the track foreman, Edward Harmon, because the number of track hands was being reduced. On the morning of the 26th of that month he started out with a gun, as he said, to kill some birds. He went into Perryville to show a friend a book he had received. When he left his friend's house he started up the street where he met House. He testified that House stopped him and said he wanted to see him—that he wanted him to come along with him; that House asked him to let him see his gun, which he handed to him and House gave it to another man and grabbed him by the coat, saying: "You will come; you must come."

The plaintiff said he took the gun from the man who had it and started up the street; that he looked back and saw a mob of about forty men following him, of which House was the leader. The crowd followed him and some shots were fired at him. He ran up the road towards Port Deposit, and finally entered the house of a Mr. Keesey, which was about seventy-five yards from the railroad, where he left his gun and a pistol. He then went out of the house, and his testimony and that of some of his witnesses tend to show that he was outrageously treated—having been struck on the back of the head by House with a billy, and otherwise injured and abused. He was taken to Perryville station and from there to jail at Elkton. The only charge preferred against him was for carrying concealed weapons, and he was convicted, fined and discharged upon payment of the fine.

House's version of the occurrence on the street in Perryville was that when he met the appellee he asked him to go with him to the station to talk with Ed. Harmon, he asked for his gun which he got and handed to another man who was standing by, and then felt his clothes to see if he had a pistol on him; that he discovered that he had, and *then* told him he was under arrest; that appellee grabbed the gun

and ran, and as they followed him he was acting as if he was about to shoot at them; that when he saw him aim his gun at one of the men he told the man to shoot him; that they followed him to Keesey's and when he came out of the house, he (House) thought he was about to draw his pistol and then he struck him with a billy.

Shortly before House met the plaintiff on the street, he had been told by Harmon that the plaintiff had threatened his life, and that it was said he was at the toolhouse on the railroad between Perryville and Port Deposit, "lying there in wait to kill Ed. Harmon, they supposed." It is stated in the brief for the appellee that when House heard that, "he immediately started out to look Stumpo up" and met him on the street, but the record does not sustain that statement. He was asked this question: "That was before you started out to arrest him?" To which he replied: "Yes, sir; I didn't start out to arrest him," and instead of going to the toolhouse he went up the street where he met the plaintiff. It may not be easy to understand, but House, when called as a witness for the plaintiff, testified positively that he did not know at the time that Harmon was one of the railroad company's men, and there is no other testimony in the record on the subject.

Assuming, as we must, the plaintiff's theory of the arrest on the street to be correct, the important question in the case is raised by the defendant's first prayer, which asked that the jury be instructed that there was no legally sufficient evidence to entitle the plaintiff to recover against the railroad company. That was offered on the theory that there was no evidence legally sufficient to show that House was at the time of the arrest acting for the company, and within the scope of his employment. He was certainly not engaged at the time in protecting the company's property. Nor was he acting "for the preservation of peace and good order on the premises of the said company," unless it can be fairly said that because Harmon discharged the plaintiff, and had heard that the plaintiff had threatened him and was lying in wait

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at the toolhouse to kill him there was evidence from which a jury could infer that House was acting, and had, under his employment, the right to act for the company in arresting the appellee. The arrest was on a public street of Perryville, and not on the premises of the company, and there is not a particle of evidence which tends to show that the plaintiff had done anything up to the time that House met him which would have justified the company, or any one acting for it, to put him under arrest, for it can scarcely be claimed that the appellee, who had been in the employ of the company and was simply dropped or put off because the company was reducing the number of track hands, was liable to arrest for going on the railroad. If he had threatened Harmon, and Harmon was afraid of him, he could have sworn out a peace warrant against him, but unless the facts that Harmon was in the employ of the company, had discharged the plaintiff who afterwards threatened his life, and that House was a policeman appointed as above stated are sufficient to permit a jury to say the company was liable for the arrest, there is nothing in the record which can justify the submission of the case against it to the jury. The evidence offered by the plaintiff to show that it was within the scope of his employment seems to us to point to the contrary.

One witness said that House's services for the appellant were "protecting the company's property and interests and making arrests of riders on freights and such like." When asked whether he arrested persons on passenger trains, that witness said: "No, not passengers, unless they were disorderly and misbehaved themselves, then I believe he would make an arrest of the kind," and "around the station at Perryville."

Another said he had seen him arrest trainriders and one or two for being drunk and disorderly around the station. House said he had arrested people for being drunk and disorderly and for illegal train riding. He swore positively that he had never arrested anyone for trespassing on the rail-

road property, except illegal trainriders, and there is no evidence tending to show that he had ever arrested anyone for the company, who was not at the time on its premises. In the absence of proof of some authority, it certainly cannot be said that Harmon, a track foreman, could make the company liable by authorizing House to arrest the plaintiff, or anyone else, for threatening him. If a policeman, appointed under our statute, at the instance of a corporation, does make an arrest on the premises of the corporation, or in protecting its property, it may well be required to assume the burden of showing that it was not within the scope of his employment, but when he arrests one who had done nothing of which the company can complain—the arrest being on a public street of a town, and not on the premises of the company—the plaintiff must show that such an act was done by the authority of the company, express or implied, and was within the scope of his employment. If the railroad company is liable because House arrested the plaintiff under the circumstances of this case, then it would be liable if any employee complained to a policeman similarly appointed of threats by some one against him, and there was a rumor that the one who made the threats was lying in wait for the one threatened. The statute, in addition to what we have said, also authorizes such policeman to exercise in the counties and cities in which the railroads, etc., are situated “all the authority and powers held and exercised by constables at common law and under the statutes of this State, and also all the authority and powers conferred by law on policemen in the city of Baltimore.” but it is manifest that it is not intended to make the corporation applying for the appointment liable for everything such policeman may do, regardless of whether it be for the protection of its property or the preservation of peace and good order on its premises.

In *Tolchester Beach Improvement Company v. Steinmeier*, 72 Md. 313, it was distinctly said that a company was not liable for the acts of a policeman appointed under this statute simply because he was appointed by the Governor at its nom-

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ination, or because it paid the salary of the policeman. In speaking of the policeman in that case, the Court said: "Primarily Fletcher was a State officer," and again: "He was responsible to the State for the proper discharge of his duty, and not to the company. He was not answerable to the company, but to the State, and could be indicted for malfeasance as any other State officer. His duty was the same as any other policeman or constable." It was also said: "It was for the privilege of commanding, at all times when needed, an officer with constabulary power for the protection of their property, and preserving the peace on their boats and premises, where in their peculiar business a need for such person, clothed with such authority, so often arose, that the law required such corporations to pay his salary." Emphasis is also laid on the fact that what was complained of in that case was not done on the premises of the company, or for the preservation of its property. It was said: "In addition to all these reasons why Fletcher's act cannot be regarded as the act of the appellant, it is to be noted especially that, so far as the appellant is concerned, his duty to it, so far as the exercise of his peace-power was concerned, is, by the language of the statute and his commission, restricted to *the premises* of the company. Whatever was done was not done on the premises of the company." The Court was careful to say that "it is not necessary for us to hold that Fletcher was in no sense an officer of the company, and that, if called on to enforce regulations and by-laws of the company, and he did so purely because of his relation to the company, the company could not be answerable for what was wrongfully done in pursuance of that authority, but within the scope of his employment." Since that case we have often held that a corporation may be liable for the acts of such a policeman, when acting as an employee of the company, and within the scope of his employment. *Deck v. B. & O. R. R. Co.*, 100 Md. 168; *B. & O. R. R. Co. v. Deck*, 102 Md. 669; *B. C. & A. Ry. Co. v. Ennalls*, 108 Md. 75, and other cases.

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Nor can it be denied that it is generally for the jury to determine whether or not the person guilty of an alleged assault was at the time the employee of the company and acting within the scope of his employment. In *Con. R'y. Co. v. Pierce*, 89 Md. 503, that rule was recognized, and after citing *Cleveland v. Newson*, 45 Mich. 62, where it was held that the burden was on the defendant to show that the servant was not engaged in the course of his employment, and *Rounds v. Del., Lac. & West. R. R. Co.*, 64 N. Y. 129, where it was said it was ordinarily a question to be determined by the jury, we added: "But, as was said in *Ritchie v. Waller*, *supra*, (63 Conn. 155, S. C. 27 L. R. A. 161), when the servant's deviation from the strict course of his employment or duty is slight and not unusual, the Court may determine, as a matter of law, that he still executing the master's business, and if the deviation is very marked and unusual it may determine the contrary. If, as in the *Peacock Case*, *supra* (69 Md. 257), the driver deliberately abandons his car and makes an assault on one not a passenger, on the sidewalk, the Court must determine the question, because the act is too clearly out of the course of the servant's employment to hold the master responsible." In *Deck's Case*, 100 Md. 168, while the general rule is fully recognized, the Court went into the question as to whether there was legally sufficient evidence to justify the submission of the case to the jury. It was held that there was, as we also determined in the second appeal between those parties. The same may be said of the case of *B. & O. R. R. Co. v. Strube*, 111 Md. 119. In those cases it must be noticed that the alleged assaults occurred on the premises of the company, where the policemen were authorized to act, and there was ample evidence to show that the officers were acting for their employer and within the scope of their employment.

But in this case, there is not only no evidence of violation of the law by the appellee on the company's premises, of which it or anyone acting for it could complain, but the arrest was not on its premises, and the only charge made against

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the appellee was for carrying concealed weapons. The Court below instructed the jury that the railroad company was not liable if the arrest was made for carrying a concealed deadly weapon, and not for trespassing on the railroad company's property.

As we have seen above, House testified that he had not started out to arrest the plaintiff, and that he did not know that Harmon was one of the railroad men, and, although it may be said he was an adverse witness, he was a witness for the plaintiff when those statements were made and there is no evidence to the contrary. Unless it is necessary to submit every case to the jury in which it is shown that the act complained of was done by a policeman, appointed under this statute, it is difficult to see why this case, as presented by the record, must be so submitted. In *Cleveland v. Newsom*, 45 Mich. 62, referred to in *Con. R'y. Co. v. Pierce, supra*, the boy causing the injury was not only in the employ of the defendant, but was doing something for the defendant which was clearly within the scope of his employment, unless he had turned aside from that employment for his own purposes, the burden of proving which was properly held by JUDGE COOLEY to be on the defendant. But in this case House was primarily a State officer, acting at the time off the premises of the appellant, not protecting its property, and under such circumstances as might well raise the presumption that he was acting in the capacity of a State officer and not as an employee of the company. It was necessary, therefore, for the plaintiff to offer evidence legally sufficient to show that he was acting within the scope of his employment, which we do not think the plaintiff has done.

We have not thought it necessary to discuss what occurred after the plaintiff left the street in Perryville, for unless House was acting within the scope of his employment when he arrested the appellee on the street, it cannot be claimed that he was subsequently. House's conduct in shooting at or directing another to shoot at the appellee when he was trying to escape, or what was done after he was caught, at Mr.

Keesey's, cannot be justified or excused, but that does not authorize the appellant to be mulcted in damages in the absence of legally sufficient proof that he was acting for it, within the scope of his employment.

So without discussing other exceptions, we must hold that the defendant's first prayer should have been granted. As there is nothing to justify a judgment against the company, the judgment against it must be reversed without a new trial.

Judgment against the Philadelphia, Baltimore and Washington Railroad Company reversed, without awarding a new trial, the appellee to pay the costs in this Court, including the transcript and printing of the record, and one-half of those in the lower Court—the judgment against House not being before us for review.

HENSON MATTHEWS vs. MATILDA MATTHEWS.

*Divorce—Sufficiency of Evidence of Abandonment and Desertion—Proceedings in a Former Suit
Not Proved in Second Case.*

Upon a bill for a divorce *a vinculo* on the ground of the abandonment and desertion of the plaintiff by the defendant, the evidence examined and held to show that the defendant had abandoned the plaintiff without just cause; that the separation had continued uninterruptedly for more than three years, and is deliberate and final; that the separation of the parties is beyond any reasonable expectation of reconciliation, and that the plaintiff is entitled to a decree of divorce.

The answer to a bill for a divorce alleged that the allegations of the bill had been passed upon by a decree of the same

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Court in a former suit between the same parties, and that no further cognizance ought to be had of the present cause. Neither the testimony nor the decree in the former cause was filed or proved in this suit. *Held*, that the proceedings in the former cause, not having been put in evidence, are not to be considered in determining the present case.

Decided February 24th, 1910.

Appeal from the Circuit Court for Washington County (KEEDY, J.).

The cause was submitted to the Court on briefs by:

Jos. W. Wolfinger, for the appellant.

Scott M. Wolfinger, for the appellee.

BRISCOE, J., delivered the opinion of the Court.

The bill in this case was filed on the 5th day of December, 1908, in the Circuit Court for Washington County, by the appellant against the appellee to procure a divorce *a vinculo matrimonii*, on the ground of abandonment and desertion, under Art. 16, sec. 36 of the Code of Public General Laws.

The appellant and appellee were married on the 16th day of August, 1893, and lived together as husband and wife, in Hagerstown, Md., until sometime in February, 1905. It is charged by the bill and admitted by the answer that they have lived apart for over three years.

The bill was filed on the 5th day of December, 1908, is in proper form and contains the usual and necessary averments in bills for divorce for abandonment and desertion under the statute. If the averments of the bill are sustained by the proof, the plaintiff is undoubtedly entitled to the relief sought by this suit.

The statute, Art. 16, sec. 36, Public General Laws, provides the cause or the grounds upon which the Courts in this State may decree a divorce *a vinculo matrimonii*, and one of

the causes is provided as follows: "When the Court shall be satisfied by competent testimony that the party complained against has abandoned the party complaining and that such abandonment has continued uninterruptedly for at least three years and is deliberate and final and the separation of the parties beyond any reasonable expectation of reconciliation."

This statute has frequently been before this Court for interpretation and the rules by which this and similar cases are to be controlled have been fully considered and stated by this Court.

In *Gill v. Gill*, 93 Md. 654, this Court re-affirmed the rule laid down in *Lynch v. Lynch*, 33 Md., to the effect that abandonment, to constitute ground for a final divorce, must be the deliberate act of the party complained of, done with the intent that the marriage relation should no longer exist, and we there said, "and this is in full accord with the best considered cases elsewhere." *Lynch v. Lynch*, 33 Md. 328; *Gill v. Gill*, 93 Md. 654; *Gregory v. Pierce*, 4 Metcalf, 479; *Bennett v. Bennett*, 43 Conn. 313.

Mr. Bishop in his work on *Marriage, Divorce and Separation*, Vol. 1, secs. 1662 and 1672, says desertion as a matrimonial offence is the voluntary separation of one of the married parties from the other or the voluntary refusal to renew a suspended cohabitation, without justification either in the consent or the wrongful conduct of the other. In all cases the criterion is the intent to abandon. And in *A. & E. Ency. of Law*, Vol. 9, page 764, it is said: Desertion is the wilful termination of the marriage relation by one of the married parties without lawful or reasonable cause or a refusal without reasonable cause to renew the marriage relation after parties have been separated.

In the case now under consideration, the evidence is clear and undisputed as to the continuous and uninterrupted separation of the parties for the statutory period of three years, and that the abandonment of the husband by the wife, at the time of desertion, was deliberate and final.

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The sole question for us to consider, on this record, and one of the requirements of the statute that the plaintiff must meet, is whether this conceded separation of the parties for over three years is beyond any reasonable expectation of reconciliation. And this brings us to a consideration of the pleadings and proof set out in the record.

The bill, after alleging the marriage on the 16th day of August, 1893, in Hagerstown, Maryland, where both of the parties resided, and where they lived until their separation, and that no children have been born of the marriage, and that the plaintiff provided a home for the defendant, was always a faithful and loyal husband to her, giving her no cause or reason to leave his home, alleges in the third paragraph of the bill: That on the 14th day of February, 1905, the defendant abandoned and deserted him, without any cause whatever, that the abandonment is deliberate and final. and has continued for more than three years and is beyond any hope of reconciliation. And by the fourth paragraph of the bill, the plaintiff avers that he has not lived nor cohabited with the defendant since she left him and that he has always been willing to live with her and provide a home for her, as he always had done.

The defendant answered this bill on the first of February, 1909, admitting in part its allegations, except the allegation of abandonment and that the plaintiff is entitled to a decree of divorce, but avers by the fifth paragraph of the answer, that the allegations complained of in the bill filed in this cause were heretofore passed upon by a final decree of this Court passed in No. Equity, in the Circuit Court for Washington County, Maryland, and no further cognizance ought to be had of this case.

To this answer the plaintiff filed a general replication on the 10th of February, 1909, joining issue on the answer, in so far as it denied the allegations of the bill and testimony was subsequently taken on behalf of the plaintiff, but none on behalf of the defendant. The testimony appears to have

been closed and returned at the request of the counsel for the plaintiff and consent of the counsel for the defendant.

The case was heard in the Circuit Court for Washington County, on the pleadings and evidence and from a decree passed on the 16th day of March, 1909, denying the relief sought by the husband and dismissing the plaintiff's bill, this appeal has been taken.

We cannot agree with the conclusion reached by the Court below, on the record in this case, that the plaintiff has failed to establish a case of abandonment and desertion on the part of the wife, within the meaning and contemplation of sec. 36 of Art. 16 of the Code of Public General Laws, as to entitle him to a divorce. On the contrary, we think, the proof is sufficient and ample not only to answer the requirements of the statute but to warrant and justify the decree asked by the plaintiff in his bill.

The uncontradicted evidence shows that the wife abandoned her husband's home more than three years ago, without any lawful and reasonable cause, and the separation has continued uninterruptedly since the day she left him to live with her sister in the same town. She has refused without reasonable cause and without any explanation whatever, to renew the marriage relation, although requested by her husband to do so, and has repeatedly stated to others that the separation was final and that she would never return to his home.

The plaintiff testified "that since my wife left me about four years ago, I have asked her to return and live with me but she said 'never again.'" He also testified, that she had left him several times before the final separation, that he was always ready and willing to provide a comfortable home for her and would be with her now, if she had stayed, that he had provided her a good home and gave her no reason to leave "our house."

The plaintiff's testimony is not only supported and corroborated by the undisputed testimony of four disinterested witnesses, but by all the circumstances surrounding the sep-

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aration since and at the time of the desertion of the husband by the wife.

The witness, Washington, a nephew of the defendant, testified that he knew the plaintiff and defendant, that he visited their home while they lived together as husband and wife. "I remember the occasion about four years ago when Mrs. Matthews left Mr. Matthews. I know that she has never lived with him since. Mrs. Matthews, in a conversation I had with her about three or four months ago, told me that she would never live with Mr. Matthews as long as she lived. I have also heard her tell others in my presence that she would never live with him again. Mrs. Matthews has always had a high temper. Mr. Henson Matthews always provided a good home for his wife, and he always tried to have everything as comfortable as a poor man could. From my acquaintance with Mrs. Matthews, I believe the separation is final. She once spoke to me about her liking to have a home, and I told her that would be all right as soon as she and Mr. Matthews got together again, and she said, never as long as she lived."

There was also testimony to the effect that the defendant was previously married to one John Brown, now deceased, and they lived together awhile as husband and wife, but she deserted and abandoned him in the same manner as she did her present husband, that she had a "very mean and quarrelsome disposition," that the plaintiff had always been a faithful and loyal husband, and provided a comfortable home for her, but that she would not live with him, nor return to his home.

In this state of the proof, without any attempt on the part of the defendant to justify or explain her conduct in abandoning her husband's home, her continued absence therefrom although residing in the same town, and her declared intention never to return to him or to live with him again, although requested to return, we think all of the requirements of the statute are clearly and fully made out, and the plaintiff is entitled to the relief prayed.

The ground upon which the learned judge below denied the relief and dismissed the bill, as stated in his opinion, is, that "this is the second application made by the complainant for a divorce, the first being on the 2nd day of March, 1908. the same being equity cause No. 6879, and the application in this case being filed on the 5th day of December, 1908. On the 11th day of June, 1908, I filed an opinion in the first cause, and dismissed the bill of complaint." He then proceeds to deny the relief in this case upon the ground that the request by the husband of his wife to return to his home and live with him was made subsequent to the first suit, and was not made in good faith to accomplish the object of reconciliation. He then says: "This was the first time he had made any such request of her since the separation and in view of what he testified to in the other case; in view of the ground upon which the application in the other case was denied; and in view of the fact that just about the time he asked her to return he made application in this case, it requires no stretch of the imagination to see that the request was not made in good faith, to accomplish the object of reconciliation, but to get rid of the difficulty in the way of his desire for a divorce." He also states, "without further discussion I hereby refer to the opinion filed in No. 6879, in equity, and the views therein expressed," and rests his conclusion largely upon an alleged inconsistency between the facts in the first application above referred to, and those of this case, as to the sincerity of the effort made by the husband to reconcile his wife.

While there is a reference to the former suit in the defendant's answer, the record in this case fails to disclose a certified copy of the testimony, the decree, the opinion of the Court below or any of the proceedings in the former case to be taken and used as evidence in this case. There was no testimony taken at all on the part of the defendant or any exhibits filed before the Examiner. The proceedings in the first case were not therefore properly before the Court below

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in this case, and not being in the record, are not before us on this appeal.

In *Anderson v. Cecil*, 86 Md. 490, this Court said: This Court cannot look outside the record for the facts of the case. If as contended at the argument, the complainant's right to the relief prayed for in the bill rested upon anything in those proceedings, they should have exhibited with the bill, such evidence of their claim as would satisfy the Court of the correctness of their contention. If the facts rest in record or depend upon written evidence, such documentary evidence of their truth, as office copies, or short copies and docket entries are required. *Myers v. Amey*, 21 Md. 306.

The fact that the proceedings referred to may be in the same Court will not relieve the parties of this obligation. "A Court will take notice of its own records, but cannot travel for this purpose out of the records relating to the particular case; it cannot take notice of the proceedings in another case, unless such proceedings are put in evidence." 2 *Wharton on Evidence*, sec. 326.

In *Fisher v. Fisher*, 95 Md. 320, it was held, if there be reason for the suspicion that important testimony has not been produced the Judge may of his own motion elicit such evidence, in any manner that the rules of his tribunal will allow.

In *Fisher's Case*, *supra*, the Judge sent for the solicitors in the case, and in open Court they admitted to the Court that the parties to the cause on trial were the same persons who were parties in the former case of *Fisher v. Fisher*, where a bill and a cross-bill for divorce had been dismissed upon the ground that both parties were *in pari delicto*, that is, had violated their marital vows. This Court in passing upon the facts of that case said, it was entirely proper for the Judge to elicit, on his own motion, proof as to the identity of the parties and it having been admitted that Louisa Fisher and William L. Fisher parties to this cause are the same persons who were the parties to the antecedent cause, the bill was properly dismissed.

In this case, there is nothing in the record to show that the proceedings in the former case were put in evidence, and the mere reference to the proceedings in the answer is not supported by any proof whatever. It would not be sufficient, even if it was considered by the Court, to establish the defence of *res adjudicata*, or avail the defendant on this appeal, without disregarding the testimony on the part of the plaintiff by four disinterested witnesses, set out in this record, as to the intention and determination of the wife to live apart from her husband, and to defeat the plaintiff's application under the facts of this case. *Feigley v. Feigley*, 7 Md. 537.

The testimony, we think, fully supports the plaintiff's case, and entitles him to a decree *a vinculo matrimonii*, as prayed by the bill.

The cases of *Twigg v. Twigg*, 107 Md. 680, and *Wheeler v. Wheeler*, 101 Md. 435, relied upon by the appellee, are entirely unlike this, and rest upon dissimilar facts.

For the reasons stated, the decree of the Circuit Court for Washington County, passed on the 16th day of March, 1909, will be reversed and the cause is remanded, to the end that a decree *a vinculo matrimonii*, may be passed in conformity with this opinion.

Decree reversed, cause remanded to the end that a decree a vinculo matrimonii. may be passed in conformity with this opinion, with costs to the appellant above and below.

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Syllabus.

ALBERT N. HORNER ET AL. vs. JOHN T. POPPLEIN.

Bill to Restrain Execution on Judgments—Magistrate's Judgments Improperly Entered—Laches in Prosecution of Suit.

Plaintiff alleged that certain judgments rendered against him by Justices of the Peace had been rendered without his knowledge or consent, although purporting to have been made by confession; that certain other judgments entered against him by Justices and assigned to the defendant had been paid, and that the total amount of his real indebtedness to the judgment creditor was much less than the amount of the outstanding judgments. *Held*, that the evidence establishes most of the averments of the bill, and that the defendant should be enjoined from enforcing the judgments by execution upon payment by the plaintiff of a certain sum ascertained from the testimony to be the real amount of his indebtedness.

The entry of a judgment against a party, whether made in consequence of a mistake or of a misrepresentation as to his identity, is void if he was not served with process or did not confess the judgment.

When the person to whose use certain magistrates' judgments were entered sought to enforce them, the judgment debtor, in November, 1904, filed a bill to restrain the execution. The defendant's amended answer was filed in March, 1908, and the cause was tried in August, 1909. *Held*, that there was not such laches in the prosecution of the suit as requires the dismissal of the bill.

Decided February 25th, 1910.

Appeal from Circuit Court No. 2 of Baltimore City (SHARP, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

William S. Bryan, Jr., and Julius H. Wyman (with whom was *Wm. S. Taylor* on the brief), for the appellant.

Bernard Carter (with whom was *R. H. Johns* on the brief), for the appellee.

URNER, J., delivered the opinion of the Court.

The question presented by this appeal is one of fact and arises upon proceedings in equity instituted by the appellee for the purpose of having canceled and released a number of magistrates' judgments which purport to have been rendered against him by confession.

It was stated in the bill of complaint that a certain Albert N. Horner had recently placed on record fifteen judgments alleged to have been confessed by the complainant in favor of one John C. Foster before certain justices of the peace in Baltimore City, amounting to the sum of thirteen hundred and twenty-five dollars, the judgments having been entered to Horner's use; that some of the judgments were never rendered by the justices named, or if so, were rendered without the complainant's knowledge or consent; that part, if not all, of the judgments had been paid, but had not been entered satisfied on the magistrates' dockets; and that the defendant, Horner, had issued execution on one of the judgments and caused a levy to be made upon property of the complainant and had threatened to issue execution on the other judgments, which would occasion the complainant great loss and injury.

The relief prayed for was that the defendant be directed to file certified copies of the judgments, to disclose the time and amount of all payments made by the complainant to him since their alleged rendition, and to cancel and release all or any of the judgments which had been satisfied.

In his answer, as amended after exception, the defendant stated that he had filed certified copies of the judgments held by him against the complainant and denied that there had been any payments on account of the judgments so filed. He then averred that the complainant on November 2nd, 1901.

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paid to the defendant a sum approximating one thousand dollars in satisfaction of ten one hundred dollar judgments which were never recorded, and that on April 10th, 1905, he paid one hundred dollars in settlement of another outstanding judgment upon which execution had been issued, but that none of these judgments had any connection with the judgments filed and relied upon in this case, and that they have never been satisfied but are due and payable.

The judgments exhibited with the answer were fourteen in number, of which eleven purported to have been rendered by Justice John Behrens and three by Justice C. Charles Friedel; but it appeared afterwards that twelve of the judgments were properly attributable to the former and only two to the latter. Of the Behrens judgments two were dated February 26th, 1901, five July 17th, 1901, one March 4th, 1902, two April 1st, 1902, and two April 18th, 1902; and the Friedel judgments were both dated March 18th, 1902. Each of the judgments was for one hundred dollars with interest from date and costs of suit, except that one of the Behrens judgments of July 17th, 1901, and that of March 4th, 1902, were for fifty and fifty-five dollars, respectively and one of the Friedel judgments was for seventy-five dollars. The total amount of the judgments, therefore, was twelve hundred and eighty dollars. They all purported to be entered by confession in favor of John C. Foster and against John T. Popplein, the appellee, with entries to the use of Albert N. Horner bearing dates from October 20th to 22nd, 1904, corresponding with the dates of the receipt of the judgments for record in the office of the clerk of the Superior Court of Baltimore City.

It appears that subsequently to the filing of the bill of complaint execution was issued on eleven of the judgments, and upon petition of the complainant an order was passed restraining the defendant from proceeding with the enforcement of the judgments until the determination of this suit.

Testimony was later adduced by both sides, and upon final hearing the Court below passed a decree, from which this ap-

peal is taken, making perpetual the interlocutory injunction on condition that the complainant pay into Court the sum of four hundred and seventy-five dollars, which was decreed to be the amount owing on all the judgments of record referred to in the proceedings.

The evidence contained in the record is conflicting and in some particulars is quite obscure, but after a careful study of it we are of the opinion that the decree should be affirmed.

There is no pretense that any of the judgments in controversy were rendered upon any consideration except for money claimed to have been furnished by the appellant to the appellee through Foster, the judgment plaintiff. In none of the transactions did the appellant and appellee come into contact, and whatever indebtedness existed between them on account of the judgments was contracted through Foster as an intermediary. The testimony of both the appellee and Foster as to the amount of the indebtedness, was to the effect that it did not at any time exceed thirteen hundred dollars, of which the appellee paid one thousand dollars to the appellant on November 20th, 1901, leaving a balance of three hundred dollars due at that time, and that on April 9th, 1905, he paid one hundred dollars in settlement of one of the judgments on which execution had been issued; and they both insist that two hundred dollars is now the total extent of the appellee's liability. It was testified by both of these original parties to the judgments that on the occasion of the one thousand dollar payment the appellant stated explicitly that the balance of his claim was then three hundred dollars. When the appellant's attention was directed to this evidence, in the course of his testimony in his own behalf, he said that he did not recollect making the statement attributed to him but would not say that it had not been made. He disclaimed having any independent memory of the transactions, but relied largely upon the fact that the judgments were outstanding. Even upon this basis his contention was erroneous, as he repeatedly stated that the unpaid indebtedness was thirteen hundred and eighty dollars, while the judgments themselves

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exhibited with his answer amount to one hundred dollars less than he claims.

He admits that he paid none of the money to the appellee and states that the whole amount was paid to Foster, who assures the Court upon his oath that the appellee received only thirteen hundred dollars. This would seem to be conclusive, in connection with the appellee's testimony, as to the real amount of his indebtedness on account of the confessed judgments, unless we are controlled by the fact that the appellant actually holds judgments in excess of that amount purporting to have been confessed by the appellee.

In regard to the rendition of the undisputed judgments Foster testified that the mode of procedure was that he would go with the appellee to the magistrate, would obtain judgment by confession for one hundred dollars each and enter them to the use of the appellant, to whom he would take copies of the judgments and from whom, upon delivery of the transcripts, he would receive the money; that these amounts were always secured by confessions of judgments and that the transactions did not aggregate more than \$1,200 or \$1,300. The appellee testified that the judgments he confessed in favor of Foster numbered only twelve or thirteen, and that in each instance he gave a judgment for one hundred dollars and received ninety. The appellant's testimony in this connection was to the effect that Foster brought him the judgments on the various occasions and that the appellee was not present; that he paid Foster full consideration for the judgments by cash and checks but did not know on what banks the checks had been drawn; and that a statement filed by him showing fifteen judgments, in addition to those which had been satisfied, was correct.

Justice Behrens' account of the transactions was that the judgments were entered up at the request of Foster; that he hardly thought the appellee was present; that he docketed eleven of the judgments on December 31st, 1900, the first being filled out in the usual form and the remainder being entered "ditto;" that this was due to haste on the part of

Foster who offered him five dollars to enter the judgments and write out the transcripts within half an hour; that three of the other judgments rendered by him and exhibited in the case were entered in the same abbreviated way on his docket because Foster or Horner was in a hurry; that he did not charge up the costs of the judgments because he owed the appellant on a loan and the costs were to be applied to that indebtedness; that he would not accept a judgment by confession unless he knew the parties or had an order, but that having known Foster for thirty-five years he felt safe in taking an order from him, and he was satisfied that the order was filed in the City Court among the papers. No such order, however, was produced in evidence.

In reference to the judgments rendered by Justice Friedel it was testified by him that he had no recollection whatever on the subject; that his custom was to have a written authority signed in his presence by the defendant for the entry of a judgment by confession; that he does not know the appellee; and that the orders for the judgments in question were destroyed by the fire of February, 1904.

The evidence as to the circumstances under which some of the judgments were rendered is not such as to create confidence in their validity. There is ample opportunity for error as to the identity of the party and the amount of the indebtedness when judgments by confession are rendered in the absence of the defendant and in such haste as to require the use of ditto marks to represent them on the docket. In order that a judgment of this character may be binding it is necessary that it be entered by actual consent of the party to be bound indicated by his personal presence and request or by his authorization in writing or through an attorney. If he does not *in fact* confess the judgments and is not served with process, its entry against him whether in consequence of innocent mistake or deliberate misrepresentation as to his identity, cannot be held to affect his rights. As was said by this Court in *Hanley v. Donoghue*, 59 Md. 243: "It is essential to the validity of a judgment *in personam* that the Court

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should have jurisdiction over the parties, and if rendered without such jurisdiction, it is a mere nullity." There can be no question and none has been raised, as to the jurisdiction of a Court of Equity to restrain the execution of judgments thus rendered.

In the present instance there was no process issued, and he must find from the decided weight of the evidence that the appellee did not in reality confess the judgments now sought to be enforced and that they do not represent any indebtedness by him contracted.

The appellant offered in evidence a paper dated October 10th, 1901, purporting to have been signed by the appellee and witnessed by Justice Behrens acknowledging "that the confessed judgments, 18 in number, now in the hands of A. N. Horner, are *bona fide* and true judgments due him by me at this date without interest to September 1st, 1901, and without set off of any kind." It was testified by the appellant that he wrote this paper and that the signature to it was the appellee's, but that he did not remember seeing it signed; while the appellee, on the other hand, swore emphatically that it was not his signature and that the statement contained in the paper was not true. Justice Behrens' testimony on this point was that he could almost positively say that he never saw the paper before although it was his signature attached; that if the paper was signed by him, it was signed in Mr. Horner's office; that he never read it before he was called as a witness in this case; and that he could not say that he saw the appellee sign the paper as it may have been handed to him already signed. No explanation was given by the appellant as to why he considered it necessary to prepare this written evidence of recognition by the appellee of judgments which it is claimed he had formally confessed; and as the genuineness of the paper has been explicitly denied by the appellee and it has received no affirmative support from the ostensible attesting witness, its probative force has been practically nullified.

There were certain receipts purporting to be signed by Foster filed as evidence on behalf of the appellant. One was dated March 18th, 1902, and acknowledges the receipt from the appellant of \$175 in full for judgments by confession of the appellee to Foster to that amount, and another was dated April 1, 1902, and was for \$200 in notes and cash in full for two assigned judgments against the appellee. Foster's attention was called to these receipts and also to what purported to be his signatures to the assignments of the later judgments to the use of the appellant, and his testimony in this regard is indefinite and unsatisfactory. We are not here concerned, however, primarily with the relations and transactions between Foster and the appellant but with the situation as it exists between the appellant and the appellee. As we must find, according to the evidence in the record, that the appellee confessed only thirteen judgments of one hundred dollars each and that he received only thirteen hundred dollars, we are not justified in enforcing against him a greater liability on account of any difficulty we might have in determining rights which are not before us for adjudication.

It was argued on behalf the appellant that as between the appellee and Foster the relation of principal and agent existed, and that the appellee was consequently bound by Foster's acts in reference to the judgments; but we have been unable to find that this theory is supported by the evidence.

It was also suggested that the appellee has been guilty of laches in asserting his rights against the judgments and in prosecuting this suit. The bill was filed on November 30th, 1904, shortly after the attempt was made by the appellant to enforce the judgments, the answer as finally amended was filed March 25th, 1908, and the case was brought to a conclusion in August, 1909. This does not appear to be such delay as to involve laches under the circumstances shown by the record.

The Court below evidently included the Friedel judgments in the amount it found to be due by the appellee, but it seems to us that while the conditions may have been such

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as to satisfy the Justice as to the propriety of entering those judgments, yet the direct testimony of both parties to them that they were not in fact confessed by the appellee, in the absence of convincing evidence to the contrary, would warrant their exclusion from the appellee's liability. He has not appealed however, and the decree will be affirmed in the form in which it was passed.

Decree affirmed with costs.

JOHN T. CARTER vs. MARYLAND AND PENNSYLVANIA RAILROAD COMPANY.

Extension of Time for Signing Bills of Exception—Trespass Quare Clausum Fregit—Competency of Evidence to Show Boundary of Land—Right of Party in Possession of Land to Maintain Trespass—Title in Third Party—Admissibility in Evidence of Plat of Land—Evidence of Experts as to Amount of Loss—Liability of Railway Company for Setting Timber Land on Fire—Damages.

The trial Court has the power to grant successive extensions of the time allowed for the signing of bills of exception when the first extension is made before the end of the term of Court at which the case was tried, and each subsequent extension is granted before the expiration of the time fixed by the preceding order extending the time.

A deed described the land conveyed as being tracts having certain names and as containing a designated number of acres. A part of the land was unenclosed woodland. In an action of trespass *q. c. f.* the grantee testified that he exercised acts of ownership over certain land as belonging to the farm conveyed under his deed. Another witness who lived in the neighborhood and had known the land for more than fifty

years, testified that a certain line marked one of its boundaries, and that this had been pointed out to him as such forty years previously by a former owner of the tract; and another witness, who had been acquainted with the land for thirty years, testified to the same effect. *Held*, that this evidence, documentary and oral, is legally sufficient to show that the plaintiff had such possession of the land as entitled him to maintain the action.

It is not necessary for the plaintiff in an action of trespass *q. c. f.* to show either an actual possession of the land under a paper title or an adverse one in the strict sense of that term, but a constructive possession will be sufficient. This is especially true when the action is against a tortfeasor setting up no claim of title in himself to the land.

In an action against a railway company to recover damages for the burning of timber, fencing, etc., on plaintiff's farm by a fire started by sparks from a passing locomotive, the plaintiff offered in evidence a deed and a survey showing that forty-two acres of land belonging to him had been so burned over, while, according to the survey made by the defendant, only about twenty-nine acres of the land burned over were owned by the plaintiff. The defendant also offered in evidence two deeds made in 1805, conveying a part of the burned-over timber land to persons other than those under whom plaintiff claimed. *Held*, that this evidence is not admissible to show that the plaintiff did not own the land he claimed, since the deeds merely showed that at the time of their execution such conveyances had been made, and is not accompanied by evidence to show that at the time of the fire the title to that part of the land was not in the plaintiff.

In an action of trespass by the plaintiff in actual possession of land against a wrongdoer, the defendant cannot set up in bar of the action or in mitigation of damages, that the title to the land was in a third party under whom the defendant does not claim.

A plat of a tract of land is not admissible in evidence to prove boundaries when unaccompanied by any evidence as to who made it, or when it was made, or as to its correctness.

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In an action against a railway company to recover damages for having started a fire which burned over plaintiff's timber land, the evidence of practical lumbermen, who had examined the burned area, as to their estimates of the amount of the loss in dollars is inadmissible, since that is the opinion of experts as to the precise question which was to be determined by the jury.

If a railway company negligently permits sedge grass and other material likely to be ignited by sparks from locomotives to remain on its right of way, and this material is set on fire by a passing engine, and the fire is communicated to adjoining property as a natural and direct consequence, the railway company is liable therefor, although it was not negligent in the management of the engine.

In an action against a railway company for negligently setting on fire plaintiff's timber land, he is entitled to recover, in addition to the damage to the timber and fences, the value of certain posts and rails piled on the land which were in his possession.

Decided February 11th, 1910.

Appeal from the Circuit Court for Baltimore County (DUNCAN, J.).

The prayers referred to in the opinion of the Court are as follows:

Plaintiff's 1st Prayer.—The jury are instructed that it was the duty of the defendant to keep its railroad tracks and right of way clear of combustible materials; and if the jury find that the defendant negligently permitted sedge grass and weeds and bushes likely to be ignited from sparks issuing from its engine to be and remain upon its right of way between the Wysong Trestle and the old Preston Mill Buildings, and that on the 25th of April, 1906, said grass and weeds were set on fire by one of the defendant's engines; and further find that said fire was carried by the wind through said grass and weeds to and set on fire said buildings and from said buildings carried across Deer Creek to the plain-

tiff's woodland as testified to by his witnesses, and burned it, then the plaintiff is entitled to recover in this action even though the jury believe that the defendant was not negligent in its management and use of the said engine. (*Granted in connection with the defendant's 2nd prayer.*)

Plaintiff's 2nd Prayer.—If the jury find that the property along the defendant's railroad, between the Wysong trestle and old buildings on the Preston Mill property, was, on the 25th day of April, 1906, set on fire by one of the defendant's engines, then such fire is *prima facie* evidence of negligence; and if the jury find that said fire was by reason of the wind, and grass and bushes on said property communicated to and set on fire said buildings and from said buildings communicated to the plaintiff's woodland and the same burned as the approximate cause thereof as testified by the plaintiff's witnesses, then the plaintiff is entitled to recover in this action, unless the jury is satisfied by preponderating proof that the injury complained of was occasioned without any negligence on the part of the defendant or its agents. (*Granted.*)

Plaintiff's 3rd Prayer.—If the jury find their verdict for the plaintiff then they are instructed to allow him such sum of money as they believe from the evidence will fully compensate him for all damages he has sustained as the direct result of the injury to his woodland and fences. (*Granted.*)

Plaintiff's 4th Prayer.—If the jury find their verdict for the plaintiff then he is entitled to recover, in addition to any injury they may find he has sustained from the burning of the timber and fences the value of any posts and rails they find were in his possession and destroyed by the fire referred to in this case, as testified to by his witnesses. (*Refused.*)

Plaintiff's 5th Prayer.—If the jury find their verdict for the plaintiff, and further find that the deed to the plaintiff, dated the 13th December, 1902, given in evidence, included the woodland referred to in this case lying east of Deer Creek, south of the Cherry Hill road and west of the lines testified to by Harrison Ayers and James Crowl as the division lines between the Rutledge and Rigdon or Witz lands, containing

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forty-two acres, two perches and twenty-four square roods as shown upon the plat of James W. McNabb, offered in evidence, as part of the land thereby conveyed; and that the plaintiff took possession thereof by virtue of said deed and held the same at the time of the fire referred to in this case. then he is entitled to recover all the damages he has sustained (if any) to said woodland, and to any fences thereon, caused by said fire, and the deeds, and the plat, and evidence of Walter E. Sommerville, given in evidence by the defendant, are no bar to the plaintiff's right to recover said damages. (*Refused.*)

Plaintiff's 6th Prayer.—If the jury find that the woodland lying east of Deer Creek, south of the Cherry Hill road and west of the lines testified to by Harrison Ayres and James Crowl as the division lines between the Rutledge and Rigdon or Witz lands, in Harford County, containing as shown upon the plat of James W. McNabb (given in evidence) forty-two acres, two perches and twenty-four square roods was in the possession of Joshua Rutledge as devisee under the sixth clause of the will of his father, Ignatius Rutledge, dated the 5th day of November, 1874 (given in evidence), during his life, and after his death in the possession of his wife, Phoebe Rutledge, as devisee under the first clause of his will, dated the 15th day of June, 1892 (given in evidence), and that said possession was uninterrupted, adverse and exclusive for twenty years, then such possession created a good and sufficient legal title; and further find the deed to the plaintiff of the Rutledge property, dated the 13th December, 1902 (given in evidence), and that the plaintiff entered upon and took possession of said woodland under said deed, then he acquired a good legal title thereto as well as the possession thereof; and the deeds, and the plat, and the testimony of Walter E. Sommerville, given in evidence on behalf of the defendant, cannot affect the plaintiff's said title and possession, and are no defence to his right to recover in the action for all damages the jury find (if any) was done to said en-

tire tract of woodland and the fences thereon by the fire referred to in this case. (*Refused.*)

Plaintiff's 7th Prayer.—If the jury find their verdict for the plaintiff; and further find that the plaintiff was at the time of the fire referred to in this case, in possession of the woodland lying east of Deer Creek, south of the Cherry Hill road and west of the lines testified to by Harrison Ayres and James Crowl as the division lines between the Rutledge and Rigdon or Witz properties, in Harford County, containing on the plat of James McNabb (given in evidence), forty-two acres, two perches and twenty-four square roods, claiming title thereto under the deed to him, dated 13th December, 1902 (given in evidence), as part of the property thereby conveyed, and using it as his own property, then the plaintiff is entitled to recover all the damages he has sustained (if any) to said woodland and to any fences thereon caused by said fire, and the deeds and the plat, and the evidence of Walter E. Sommerville, given in evidence by the defendant are no bar to the plaintiff's right to recover said damages. (*Refused.*)

Defendant's 1st Prayer.—If the jury find from the evidence that the tracks and roadbed of the defendant between Preston's Mill and Wysong's Trestle were kept with reasonable care and diligence during the month of April, in the year 1906, and that the first train moving northerly on the morning of April 25th in said year was operated with reasonable care and diligence, and that the engine of said train was in good order and entirely fit for service, and was provided with as good an ash pan and spark arrester as is known to railway people, and the same had been inspected regularly with reasonable care and diligence, and that an inspection thereof was made on the evening of same date and said engine was found to be in good condition and fit to be operated, and that the coal used by said engine was as good as could be gotten on the market, then the defendant is not liable for the damages resulting from the fire which started on said date along the railway tracks near Preston's Mill, even though

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the jury believe the same was started by defendant's engine, and their verdict must be in favor of the defendant. (*Granted.*)

Defendant's 2nd Prayer.—Even if the jury find that the fire mentioned in the declaration was started by the negligence of the defendant, yet if the jury further find that on the day of the fire there was a high wind and that between the railroad's right of way and Deer Creek on the lands of Preston, there was a great quantity of sedge grass, briars and other filth and also several abandoned buildings in a state of decay, all of which was very dry and combustible to which the fire spread and that by reason of said wind, burning matter from said building was carried across the creek to the plaintiff's lands, then these are facts which the jury are at liberty to consider in connection with all the facts in the case in determining whether the spreading of said fire to the plaintiff's lands was the natural and direct consequence of the starting of said fire by the defendant, and if the jury find that the burning of the plaintiff's timber was not the natural and direct result of said fire having started in the sedge grass on Preston's land, then the defendant is not liable in this action, and their verdict must be for the defendant. (*Granted.*)

Defendant's 3rd Prayer.—That in passing on the issues in this case to entitle the plaintiff to recover, it is incumbent on him to show by a preponderance of proof that the fire of May 25th, 1906, which is alleged to have caused the injury to the plaintiff, was started by the defendant operating its train near said premises, and there is no presumption either in law or in fact that the fire was originated or caused by the defendant. (*Granted.*)

Defendant's 4th Prayer.—If the jury find the deed from Harlan and others to the plaintiff offered in evidence by the plaintiff, and also deeds from Gibson and Wheeler to Rutledge and Wheeler respectively, offered in evidence by the defendant, then that part of the tract of land called the "Garden Fence" containing thirty-four and one-half acres, which

is excepted from the operation of the said deed to Rutledge, and conveyed by said deed to Wheeler did not pass under the said first named deed, and if the jury further find that about twenty-two acres of said excepted part of the said tract called the "Garden Fence" lies within the limits of the burned area, damage to which is claimed by the plaintiff, then the jury should not allow the plaintiff for any damage to the freehold including the growing timber and fences on said twenty-two acres, should they find such damage. (*Granted.*)

Defendant's 5th Prayer.—If the jury finds that the posts and rails piled in the woods, for the burning of which the plaintiff claims, were not bought by the plaintiff from the executors of Phoebe Rutledge, deceased, then the plaintiff is not entitled to recover the value of said posts and rails, and if the jury find their verdict in favor of the plaintiff, they should not allow for the loss thereof. (*Granted.*)

Defendant's 6th Prayer.—That under the pleadings and evidence in this case, there is no legally sufficient evidence entitling the plaintiff to recover, and the verdict must be for the defendant. (*Refused.*)

The cause was argued before BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

Wm. Pepper Constable and James J. Archer (with whom was Elmer J. Cook on the brief), for the appellant.

D. G. McIntosh and S. A. Williams (with whom was Fred. R. Williams on the brief), for the appellee.

SCHMUCKER, J., delivered the opinion of the Court.

The appellant, John T. Carter, recovered a judgment against the appellee company in an action of trespass in the Circuit Court for Baltimore County. The suit was brought in the Circuit Court for Harford County and was, in the first instance, tried there. A new trial having been granted the case was removed to Baltimore County where, upon a

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second trial had in November, 1908, the plaintiff secured a verdict, upon which the judgment was entered, on May 8th, 1909, from which he took the present appeal.

The appellee moved, in this Court, to dismiss the appeal for error in passing orders extending the time for signing and filing the bills of exception in the lower Court.

It appears from the record that after the rendition of the verdict a motion for a new trial was made by the defendant which was not acted on until May 8th, 1909. While that motion was pending and before the expiration of the term at which the case was tried, the Court passed an order extending the time for signing and filing the bills of exception for thirty days, and before the expiration of that period passed another order for the further extension of the time until the expiration of thirty days after the decision of the motion for a new trial. After that motion had been overruled and the judgment entered, the time for signing and filing the bills was extended by successive orders until September 15, 1909, previous to which date they were duly signed and filed. Each one of these orders was signed before the expiration of the last previous one so that there was no break or gap in the total period of the extension of the time.

We do not think that the Court below exceeded its power in granting these extensions of time. As no rule of that Court regulating this subject appears in the record we assume that none exists. Under the ordinary practice although the exception to a ruling of the Court must be taken at the time the ruling is made it is neither usual nor necessary to prepare the bills of exceptions or have them signed until after the trial at some convenient time during the term at which the case is tried; unless otherwise specially ordered by the Court, which may by an order passed during the term extend the time beyond its expiration. The bills may also be prepared and signed after the expiration of the term by consent of the parties to the case. *Poe's Practice*, sec. 319; *Wheeler v. Briscoe*, 44 Md. 308; *State v. Kent Co.*, 83 Md. 383.

Although this Court has repeatedly emphasized the importance of having bills of exception prepared and signed promptly while the recollection of the facts involved in them is fresh in the minds of the Court and counsel, it has in several cases recognized the power of the Court below to grant successive extensions of time for that purpose where the first extension is made before the expiration of the term and each subsequent one is granted before the expiration of the next preceding one. *Gottlieb v. Wolf*, 75 Md. 126; *Edelhoff v. Horner-Miller Mfg. Co.*, 86 Md. 606; *Horner v. Buck*, 48 Md. 369. It has also been held by our predecessors that the subject of the time and circumstances of signing the bills of exception "is a matter under the control of the inferior Court whose ruling cannot be revised on appeal." *Andre v. Bodman*, 13 Md. 256-7; *Wheeler v. Briscoe*, 44 Md. 311; *Rolason v. Carson*, 8 Md. 226.

Turning now to the consideration of the issues presented by the appeal, it appears from the record that the cause of action was the burning of timber and fencing on Mr. Carter's farm by a fire alleged to have been started by sparks or cinders emitted from the locomotive of a passing train of the appellee. According to a survey, made after the fire for Mr. Carter, it had burned over slightly more than 42 acres of timber, while according to a survey similarly made for the railroad company by Mr. Sommerville only about 29 acres had been burned over. The difference between the results of the two surveys was owing to a dispute as to the eastern boundary of Carter's land.

Mr. Carter claims title to his farm under a deed to him, from J. Edwin Webster *et al.*, trustees and executors of Phoebe S. Rutledge, and others, dated December 13th, 1902. in which the land conveyed is described as follows: "All that certain farm of which Joshua Rutledge, late of said (Harford) county died seized, situated partly in the fifth and partly in the third election district of said county near the rocks of Deer Creek, composed of parts of several tracts of land called "Roberts Garden," "Garden Fence," ("Roberts

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Venture enlarged"), "Best Endeavor," "Graftons Addition," "Timber Ridge" or by whatsoever name or names the same may be known or called, containing about three hundred and seventy-five acres of land, being the same and all the lands conveyed by and described in the following deeds." (Then follow the titles and places of record of four deeds from separate grantors) "and being the same and all the lands devised by the last will of Joshua Rutledge to the said Phoebe S. Rutledge," etc.

According to the recitals in the deed the land had descended from Monica Rutledge, who purchased it in 1805, to her two sons Ignatius and John W. Rutledge. Ignatius having purchased his brother's interest in the farm entered upon and occupied the same until his death, and by his last will devised it to his son Joshua Rutledge describing it in his will as "the farm whereon I now reside containing about four hundred acres which lies on both sides of Deer Creek." Joshua Rutledge devised his entire estate to his wife Phoebe S. for life with remainder to other persons, but the farm was sold under a bill filed by his creditors and purchased by his widow Phoebe S. and was sold after her death by her executors and others to the plaintiff, Carter, and conveyed to him by the deed of December 13th, 1902, already mentioned.

Mr. Carter took possession of and occupied the farm after its purchase by him and it was in his occupancy at the time the timber was burned. The timber land was unenclosed on its eastern side where it abutted on what is described in the evidence as the "Witz Land." Carter, himself, testified that he had used this timber land to cut firewood out of it, that there was no doubt in his mind that it belonged to the farm and that no one ever questioned his use of it.

Harrison Ayers, eighty-four years old, who lived "close by" the property and had known it for more than fifty years, testified that thirty-five or forty years ago the line which Mr. Carter now claims to be the true eastern boundary of his farm had been pointed out to the witness by Ignatius Rutledge who then owned the farm and Mr. Rigdon who then

owned the Witz land as the division line between their lands. The witness further testified that he had pointed out the line to the surveyor McNabb when he made the survey of the burned timber land for the plaintiff after the fire showing him the oak tree which Mr. Rutledge and Mr. Rigdon had pointed out as marking their division line.

James Crowl, who had known the property for thirty or forty years, testified that the division line between the Rutledge and Witz lands was correctly located on the plaintiff's plat prepared by Mr. McNabb. He further testified that twenty-eight or thirty years ago when Mrs. Witz got the Rigdon property, there was some feeling between the owners of the two farms as to the location of their division line and they had the line run as it is now located on the plat made by McNabb and that the witness has known the line ever since it was then run.

The evidence documentary and oral to which we have referred, constituted legally sufficient evidence of the plaintiff's possession of the 42 acres of burned timber land to enable him to maintain the present action. Although the gist of the action of trespass is the injury done to the plaintiff's possession, it is not necessary for him to show either an actual possession under a paper title or an adverse one in the strict sense of that term, a constructive possession will answer the purpose. This is especially true where the action is against a tortfeasor setting up no claim of title in himself to the land. *Poe's Pleading*, sec. 257; *Tyson v. Shuey*, 5 Md. 540; *Miller v. Miller*, 41 Md. 631; *Gent v. Lynch*, 23 Md. 58; *Wilson v. Hinsley*, 13 Md. 64; *Blaen Avon Coal Co. v. McCulloh*, 59 Md. 416; *New Windsor v. Stocksedale*, 95 Md. 196.

In *Gent v. Lynch*, *supra*, where the action was trespass *quare clausum fregit*, it is said, on page 65 of the opinion: "Though at one time it was doubtful whether the action of trespass *q. c. f.* would lie at all where there was no actual possession, and the *locus in quo* was in a wild and unoccupied state, yet it has long been settled in this country, from the

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necessity of the case, not that the action will lie without possession, but that it will lie upon that possession which the law implies to be in the owner of land, when no other person is in fact, on it. In such cases the owner has constructively the possession (citing *Cohorn v. Simmons*, 7 Iredell, 190). This is the meaning of the general expression used by the Court in *Norwood v. Shipley*, 1 H. & J. 295, and in several other cases cited in argument; that in order to maintain the action, it is necessary for the plaintiff to prove title to the land or that he was in actual possession at the time of the alleged trespass."

The plaintiff also offered evidence tending to prove that the fire which injured his timber had been started by the defendant's locomotive, and other evidence tending to show the value of the property before and after the fire and also the value of certain posts and rails cut and piled in the timber which were consumed by the fire.

The defendant, in order to prove that the legal title to part of the burned timber-land was not in the plaintiff, was permitted to put in evidence over the plaintiff's objection two deeds made in 1805 by John L. Gibson *et al.* the one to Monica Rutledge and the other to Francis I. Wheeler. To that ruling of the Court the plaintiff took his sixth exception. The deed from Gibson to Monica Rutledge is one of the four deeds referred to for the source of the grantor's title in the conveyance from Edwin Webster *et al.* under which Carter acquired title to his farm in 1902. It appears on the face of the Gibson deed to Monica Rutledge that a lot of 34 acres therein described by metes and bounds was reserved out of the tract called "Garden Fence" thereby conveyed. The deed from Gibson to Francis I. Wheeler conveyed to her the lot of 34 acres reserved out of the conveyance to Monica Rutledge under whom the plaintiff claims title.

The defendant further offered the evidence of W. E. Somerville a surveyor together with a plat made by him after the fire from an actual survey tending to show that about 22 acres of the burned timber-land claimed by the plaintiff are

included in the 34 acre lot which was excepted from the grant to Monica Rutledge under which he claimed title.

We think the learned Judge below erred in admitting in evidence the two deeds of 1805 from John L. Gibson. At most they tended to prove only that Monica Rutledge did not acquire from John L. Gibson by the deed of 1805 the parcel of 34 acres of "Garden Fence" excepted by its terms from the grant thereby made and that those 34 acres were *at that time* conveyed to Francis I. Wheeler. In the absence of proof of what land was conveyed by the three other deeds, referred to as sources of the grantor's title, in the deed of the farm to Carter, and unaccompanied by any evidence or offer of evidence tending to prove that the title to so much of the 34 acres as Carter claimed to own was in someone else at the time of the fire, the two deeds objected to should not have been permitted to go to the jury, to prove a want of either title or possession in the plaintiff at the time of the fire. Furthermore it has been often held by us that where the plaintiff has shown a sufficient possession of the land in controversy in himself to enable him to sue, the defendant, claiming no title to the property but standing in the attitude of a wrongdoer would not be permitted to show title to the premises in a third party either in defense of the action or in mitigation of damages. Or, as the same principle has sometimes been stated, the party in possession can maintain an action of trespass against anyone except the legal owner. *Harker v. Dement*, 9 Gill, 12; *Blaen Aron Co. v. McCulloh*, *supra*; *Wilson v. Hinsley*, 13 Md. 73-4; *New Windsor v. Stocksedale*, *supra*, at pages 208-9.

The seventh exception was taken to the admission in evidence of a plat dated 1805 purporting to show the outlines of "Roberts Garden" and "Garden Fence." The plat was produced on behalf of the defendant by the witness Sommerville who testified that he had received it from Wm. T. Clark, a former surveyor of Harford County about 74 years old, but he did not know who made it or the circumstances under which it was made or where Mr. Clark got it or whether it

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was correct or not when made or in whose custody it had been since then. This plat was exhibited to us at the hearing of the appeal. It certainly has an ancient appearance, but it bears on its face no indication of who made it or whence it came or whether it is an original or a mere copy. In view of these circumstances and the very meagre character of the evidence produced to authenticate it the Court erred in admitting it in evidence as an ancient document.

The first five exceptions relate to testimony for the defendant, which was admitted over the plaintiff's objection, for the purpose of showing the extent of the damage caused by the fire. These exceptions, which are of similar import, were taken to the testimony of the witnesses Sillik, Deckman and Dennis Carter, who were practical lumbermen each of whom had examined the burnt area. The portions of their testimony excepted to consisted of expressions of opinion or estimates by them respectively as to the amount of the loss stated in dollars. Some of the estimates were in gross and some were per acre, but they were all opinions of the witnesses as to the amount of the loss caused by the fire. This testimony was in essence expert testimony, consisting of the opinion of the witness expressed in exact figures, as to the amount of damage that being the very question upon which the jury were to pass from a consideration of the whole case. We have held that kind of testimony to be inadmissible in so many recent cases that it would serve no good purpose to again enlarge upon the reasons which led us to that conclusion. Those reasons have been stated in *Stumore v. Shaw*, 68 Md. 19; *Belt R. R. Co. v. Sattler*, 100 Md. 333 and 102 Md. 595; *W. U. Telegraph Co. v. Ring*, 102 Md. 681; *Con. Gas Co. v. Smith*, 109 Md. 203.

The eighth and last exception was taken to the Court's action on the prayers. At the close of the case the plaintiff offered seven prayers of which the Court granted the second and third as offered and granted the first in connection with the defendant's second prayer. It refused the fourth, fifth, sixth and seventh. The defendant offered six prayers all of

which the Court granted except the sixth which it refused. The prayers will be set out by the Reporter in his report of the case.

The plaintiff's first and second prayers and the defendant's first, second and third ones all deal with the question of the defendant's liability for the damage caused by the fire in case the jury found that its locomotive had started it. Those prayers taken together fairly state the law upon the subject to which they relate and they were properly granted.

The plaintiff's third and fourth prayers treat of the measure of damages. The third was granted and the fourth rejected. We think both of them should have been granted. The fourth one instructed the jury that if they found for the plaintiff they should allow him, in addition to the damage he had suffered from the burning of his timber and fences, the value of any posts and rails they found to have been in his possession and destroyed by the fire. The plaintiff testified that when he bought the farm he found some fence posts and rails cut and piled up on the timber-land and that he had used some of them and that the remainder had been consumed by the fire. Although the evidence did not show that he had purchased these posts and rails, apart from his purchase of the farm or that he owned them, it did show that he had such possession of them as to entitle him, under the cases we have cited, to maintain this action against the defendant for their value, their loss having been specially alleged in the declaration.

The plaintiff's fifth and seventh prayers, which were rejected should have been granted as they were both predicated upon the finding by the jury that the plaintiff was in possession of the burned timber-land at the time of the fire claiming to own it under the deed to him of December, 1902, from J. Edwin Webster, trustee, *et al.*

The statement, appearing at the end of the plaintiff's fifth and seventh prayers, that the deeds, plat and testimony of W. E. Sommerville given in evidence for the defendant are no bar to the plaintiff's right of recovery should have been

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omitted. We have held that the deeds there referred to and the alleged ancient plat should not have been admitted in evidence but the jury were entitled to consider the plat made by Sommerville and his testimony in determining the true location, upon the ground, of the eastern boundary of the plaintiff's farm, although that plat and evidence did not constitute a bar to the plaintiff's right of recovery.

The plaintiff's sixth prayer was properly refused, as the record does not present legally sufficient evidence to show that the burned land had been in the "uninterrupted, adverse and exclusive" possession of the plaintiff and those under whom he claimed for twenty years prior to the fire.

The defendant's fourth and fifth prayers should have been rejected, as was its sixth prayer, because the instructions contained in all three of those prayers are inconsistent with those given in the prayers which we have already said were or should have been granted.

For the erroneous rulings to which we have referred the judgment appealed from must be reversed and the case remanded for a new trial.

Judgment reversed with costs and case remanded for a new trial.

WILLIAM A. MORGART vs. THOMAS F. SMOUSE.

Bill by One Partner for Account of Profits Derived from Purchase and Sale of Land—Question of Fact.

Plaintiff's bill in this case alleged that he and the defendant made an oral agreement to purchase and sell certain land and to purchase and sell timber and coal on other land and to share equally the profits and losses resulting from the transactions; that the lands were purchased and sold at a profit, the money having been received by the defendant; that the plaintiff and defendant were partners as to these

transactions; that the defendant had failed and refused to account with the plaintiff or to pay him the share of the profits to which he was entitled. The answer of the defendant denied all the material averments of the bill. *Held*, upon an examination of the evidence that the plaintiff and defendant were partners as alleged in the bill, and that the plaintiff is entitled to one-half of the profits proved to have been derived from the sales of the land, less the reasonable expenses incurred by the defendant in effecting such sales.

Decided February 25th, 1910.

Appeal from the Circuit Court for Allegany County (KEEDY, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

Ferdinand Williams (with whom was *De Warren H. Reynolds* on the brief), for the appellant.

Thomas J. Peddicord (with whom was *D. James Blackiston* on the brief), for the appellee.

BURKE, J., delivered the opinion of the Court.

Thomas F. Smouse, the appellee on this record, sued William A. Morgart, the appellant, in the Circuit Court for Allegany County in an action of *assumpsit* to recover what he claimed to be his share of the profits realized from the sale of certain real estate in Garrett County, Maryland. The case was tried before the Court without the intervention of a jury, and resulted in a judgment for the plaintiff for the precise amount stated in the decree from which this appeal was taken. Substantially the same evidence was offered in that case as in this in support of the plaintiff's claim. On the former appeal, the case of *Morgart v. Smouse*, 103 Md. 463, this Court accepted for the purposes of the opinion the

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plaintiff's version of the contract, and decided that *quoad* the undertaking covered by it the parties thereto were partners, and that since it appeared there had been no settlement or accounts stated between them the suit at law could not be maintained, and for that reason the judgment was reversed without awarding a new trial.

The law applicable to the issues presented on this record is stated in the opinion in the former case. JUDGE SCHMUKER, speaking for the Court, said: "If on the other hand we treat the contract between the plaintiff and Morgart as an agreement made by them to purchase, develop and sell the lands for their joint account and to share equally in the profits and losses of the venture, the Statute of Frauds was not applicable to it, but it constituted them co-partners *quoad* the undertaking covered by it. The requisites of a co-partnership have been stated in the text books and cases in various forms of expression which substantially agree that the essential requisites to constitute the relation is a community of interest between the parties for the purpose of profit. Ordinarily the profits are expected to arise from the purchase and sale of some form of property, but they may be produced by the skill and industry of the parties as in the case of professional firms or those for the organization or promotion of various enterprises. *Parsons on Partnership*, secs. 58-61; *Lindley on Partnership*, pages 10-14; *Rowland v. Long*, 45 Md. 439; *Heise v. Barth*, 40 Md. 267; *A. & E. Encyc. of Law*, 2 Ed., Vol. 22, page 27.

"As between the parties partnership is a matter of intention to be proved by their express agreement or inferred by their acts and conduct. If they intend to and do enter into such a contract as in the eye of the law constitutes a partnership they thereby become partners whether they are designated as such or not in the contract * * *. It has been repeatedly held in different jurisdictions that an agreement by two or more persons to buy land and sell it and share either in the profits or the profits and losses constitutes them part-

ners for that venture and entitles either of them to an accounting in equity from the others of the joint transactions."

After the decision in that case, the appellee filed the present bill in equity in the Circuit Court for Allegany County upon the theory that he and the appellant were partners with respect to the undertaking mentioned in the bill for the purchase and sale of certain land; that the partnership had never been terminated, and that the appellant had never accounted for the partnership money and assets which came into his hands. It is unnecessary to set out fully the allegations of the bill, which is quite a lengthy one. Its essential averments are that in July, 1898, the plaintiff and defendant made a verbal arrangement or agreement to purchase, deal with and sell land called the Cunningham Tract on their joint accounts, and for their joint profit, and to share equally the profits and losses arising from their joint venture, and that in November, 1898, it was further agreed that said verbal agreement and venture should extend to and include two other tracts of land called "The Maynadier Lands," all three of these tracts being located in Garrett County, Maryland; that at the time the contract was made with reference to the Cunningham Tract Morgart proposed that he would furnish all the necessary money to run the deal to a finish, and to do all the work connected with it, and would do that in consideration of one-half of the profits to be made out of it, and on the other hand if a loss were sustained each party should bear one-half of the loss so incurred, and that this proposal was accepted by the plaintiff; that the work of carrying out said agreement was entered upon by the parties, and that they united their efforts to sell the Cunningham land at a profit for their joint account; that in November, 1898, the parties agreed that they would buy and deal with and sell for their joint profit the Maynadier land, and that their contract in reference to the Cunningham land should extend to and cover in all its details their operations in reference to the Maynadier land; that they secured an option on and control over said lands, and thereafter dealt with the three tracts under said agree-

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ment. The bill then charges that the land was sold by the appellant, and that, after paying all the expenses attending the transaction, there was a large sum of money left in the hands of the appellant as net profits, and that the plaintiff was entitled to receive one-half thereof; that the appellant had attempted to defraud the plaintiff of his share of the profit; and made false statements regarding the transaction; had deceived him; and had refused to account or settle; that all of said lands were bought and sold under and in pursuance of said agreement between the parties, and it was their intention at the time the agreement was made, and at the time it was extended to the Maynadier lands that all the transactions thereunder should be for the joint benefit of the plaintiff and the defendant, and that they were to share equally in the profits and losses. It appears that there were large deposits of coal on this land, and also very valuable timber, and that the timber was sold by the defendant and others to Jennings brothers.

The bill charges that the plaintiff called upon the defendant for a settlement, and was told by the defendant that there were no profits arising from the sale of the timber amounting to anything, but that the defendant paid him the sum of seventy-five dollars, which he said was one-half of the net profits of that transaction; that the plaintiff afterwards discovered that said statements were untrue and that the defendant had deceived him; that he again demanded a settlement, and that the defendant said he would make it all right when he sold the coal; that the defendant did sell the coal without the knowledge of the plaintiff, and kept the plaintiff in ignorance of the fact that he had made the sale. The bill prayed that the appellant might be required to render an account of all money received by him from the timber and coal covered by the contract, and to render a specific and itemized account of all expenses incurred by him, and that he be required to pay over to the plaintiff one-half of all the net profits received by him from the sales. It further prayed for a dissolution of the partnership. The Court found that the

contract stated in the bill had been made; that they were partners as to the undertaking set forth and that the partnership between the parties had never been terminated. It dissolved the partnership, and found that the one-half of the net profits due to the plaintiff under the contracts to be nine thousand and one dollars, and entered a decree against the appellant for that sum. It is from this decree that the appeal now before us was taken.

The answer of the defendant denied all the essential facts stated in the bill. Under the pleadings, the only real issue in the case is one of fact. Does the evidence show that the contracts alleged in the bill were made as to the Cunningham and Maynadier lands? If it does, then, under the principles announced in *Morgart v. Smouse*, *supra*, the plaintiff was entitled to recover. Upon this issue a large amount of testimony was taken. We have carefully examined this testimony, and we agree with the lower Court that the contracts stated in the bill are established by the proof; that the parties were partners as to the lands mentioned, and that the plaintiff was entitled to the relief prayed for.

This Court has said and repeated, that on a question of fact depending, as this does, entirely upon the evidence no good result can possibly arise from a recapitulation of the evidence. It is enough for the Court to announce the conclusion it arrives at. *Stirling v. Stirling*, 64 Md. 138; *Moore v. McDonald*, 68 Md. 321. There is so much testimony in the record that would serve no useful purpose to discuss it in detail. We will content ourselves with dealing with its general nature and purport, and by referring to the more prominent facts which support the plaintiff's case.

On the 20th of March, 1899, Joseph S. Bayard, S. F. Shelley and William A. Morgart entered into an agreement to share equally in all the profits which may be derived, over all legitimate expenses, from the sale or from the development of all timber and coal lands, either under conditional purchase in fee simple or by optional lease, which might be secured through and with the said Morgart in the vicinity of

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Garrett County, Maryland. On August 10th and 11th, 1899, Bayard acquired the title to the two Maynadier tracts mentioned in the bill of complaint, embracing about thirteen hundred acres of land, and on the 17th of August, 1899, the Cunningham tract referred to in the bill, and comprising about five thousand acres, was conveyed to him, and on the same day Bayard conveyed to the Jennings Brothers for the consideration of forty-seven thousand dollars the whole property, except the coal under all the lands and one hundred acres of the surface of the Maynadier tract. In this transaction, which related exclusively to the surface and timber of the Cunningham and Maynadier land, there was realized a substantial profit. This transaction was had under the agreement of March 20th, 1899. Morgart then acquired the undivided two-thirds interests of Bayard and Shelley in the coal, in consideration of fifteen hundred dollars for each of said interests. These interests were conveyed to him in 1899, and on June 5, 1901, he sold and conveyed to William J. Blackwell, trustee, the coal and all the remaining rights in both tracts for the sum of forty-five thousand dollars. Whatever net profit was realized by Morgart in these transactions it was his duty to divide equally with the appellee. It is true that there is a flat denial in the answer and in the testimony of the appellant of the contract relied on in the bill and testified to by the appellee; but the contention of the appellee is supported by the evidence of other witnesses and by a number of facts and circumstances appearing in the record. This evidence is strongly corroborative of the testimony of the plaintiff, and shows that an agreement, as alleged in the bill, was made between the parties. Unless the testimony of Messrs. Davis, Flick, Tower, Hamill, Shockey and Mrs. Smouse be disregarded, and we see no reason why that should be done, no other conclusion can be reached.

Mr. Shockey testified that in midsummer, 1898, in the month of July, he thought, he was at the home of the plaintiff and heard a conversation between him and the appellant about the timber. He said the conversation was relative to a

tract of timber land on which Mr. Smouse had an option; that Morgart was urging Smouse to let him in on the deal; that Smouse said that he had already arranged to take up the deal himself, but would consider Morgart's proposition; that Morgart proposed "that he would go equal partners and would furnish the necessary money and do the work and complete the sale of the coal land—the sale of the coal. In this way stated that Mr. Smouse would not need to raise any money. The arrangement between the two seemed to be coming to a completion upon the condition that Mr. Morgart would do what he proposed, and that he believed he could find buyers for the coal—that he was somewhat posted, while Mr. Smouse probably was not, in coal. The timber, however, on the land he would leave more to the judgment of Mr. Smouse. That in sum and substance possibly is the extent of the conversation, Mr. Morgart stating that the expenses taken out. the profits would be divided equally." The witness stated that he thought they arrived at a conclusion, and they proposed to go up and see the property. They were talking about the Cunningham tract in Garrett County.

Mr. Tower, who was a clerk in the office of Mr. Hamill in 1898, testified that Mr. Hamill, as trustee, offered the Cunningham tract for sale at public auction in 1897, but withdrew it because no adequate bid was received; that some time thereafter, the exact date the witness could not fix, Morgart and Smouse came to see Mr. Hamill about buying the property. The witness was in the insurance business, and, thinking that if they became the purchasers they would erect a saw mill upon the property, he solicited the insurance upon the bill; and that Morgart said "that he and Mr. Smouse would not hold the land if they became the purchasers, but was simply getting it as an investment;" that he understood they were partners and purchasers.

Morgart and Smouse went up from Cumberland to Oakland on the 30th of July, 1898, to see Mr. Hamill about the property. Mrs. Smouse, who went with them, testified that Morgart "came over where I sat, and he said Mr. Smouse was

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taking him to Oakland to go into a deal with him that would make big money for both of them."

The plaintiff testified that the defendant reported to him that there was about a thousand dollars' profit on the timber; but after deducting his expenses there would not be over four hundred dollars; that the defendant paid him seventy-five dollars on account, and told him he would pay him the balance from the sale of the timber, and that he would not get anything further until the coal was sold; he said the coal had cost him seventeen thousand dollars, and he did not know whether that was all it was going to cost, but as soon as it was all fixed up he would come down and settle.

Mr. Flick testified that he was present at a conversation between Morgart and Smouse, in which Morgart said to Smouse: "In this deal you will make more money than you ever made in the lumber business in your life. Addressing my conversation to Mr. Morgart, I asked him 'where is this?' He said, 'right out here in Maryland.' I said, 'What part of Maryland?' He said, 'Up in Garrett county.'"

The defendant admits that he paid the plaintiff seventy-five dollars and promised to pay him twenty-five dollars more; but he said he did this "as a matter of consolation to the plaintiff." This explanation is not satisfactory. We think this payment, under all the facts and circumstances of the case, is a recognition of the plaintiff's rights in the proceeds of the sale. The evidence abundantly shows that the defendant withheld the extent of those rights from the plaintiff. It is unnecessary to make further reference to the evidence, as we quite agree with the conclusion reached by the lower Court, "that there was such a contract or agreement entered into between the plaintiff and the defendant as constituted them partners in the deal," and that the plaintiff is entitled to the relief prayed.

The remaining question is: "What is the amount due by the appellant to the appellee?" The lower Court, as we have seen, found this to be nine thousand one hundred dollars. It ascertained that amount in this way. It charged the appel-

lant with \$3,982 received from the sale of the timber, and credited him with \$830 for expenses paid. This deducted, left a balance of \$3,152, which the Court found to be the net profit from the sale of the timber, and of which sum the plaintiff was entitled to one-half, or \$1,576. From this it deducted the \$75 paid, leaving the amount due from this source \$1,501. The Court charged the appellant with \$15,000, being one-third of the total sum for which the coal was sold. The Court found the plaintiff to be entitled to one-half of this, or \$7,500. By this method the result reached was as follows:

One-half of net profit from sale of timber.....	\$1,501.00
One-half of net profit from sale of coal.....	7,500.00

Total	<u>\$9,001.00</u>
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the amount fixed by the decree.

We think the learned judge fell into an error in fixing this amount. The evidence shows that the defendant was entitled to a much larger credit for expenses. Nearly two years intervened between the sales to Jennings Brothers, and the sale of the coal lands to Blackwell, trustee, and the evidence shows that quite a substantial sum was paid by Morgart in the effort to develop and dispose of these lands. He was charged with the full value of one-half of the coal; but was allowed nothing for expenses incurred by him in the development and sale of the coal. He testified that he had spent twelve or fifteen hundred dollars in connection with the timber, and about two thousand dollars cash on the coal land in "improving it and for experts in developing it." He said that most of this money was paid to experts, to Mr. Taylor of Pittsburg and to H. C. Yerger of Patton, Pennsylvania; and that on one occasion he paid Yerger five hundred dollars.

In view of this evidence, which is undisputed, it was error in the lower Court not to allow a larger credit to the appellant. We are not to be understood as saying that the appellant was entitled to be allowed the whole sum testified to by

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him; but on the evidence he was clearly entitled to a much larger credit than the Court gave him.

The decree, will, therefore, be reversed, and the cause remanded, with directions to take further testimony upon the subject of the expenses incurred by the appellant under and in connection with the contracts set forth in the bill.

Decree reversed and cause remanded, with costs to the appellant.

MARY A. MATHIEU vs. ELIZABETH DEUPERT
MATHIEU.

*Benefit Societies—Change in By-Law Invalidating Previous
Designation of Beneficiary.*

An unmarried man on becoming a member of a benefit society designated his mother as his beneficiary in case of his death, in accordance with the rules of the society then in force. He agreed to conform to the existing by-laws or those which might thereafter be adopted. He afterwards married and died, leaving his widow surviving, without having changed the designation of his beneficiary. Both his mother and his widow claimed the fund which became payable under the certificate on his death. After he became a member and before his marriage, the society adopted a new by-law, which provided that when an unmarried man or widower designated as his beneficiary a person other than his own children, and subsequently marries, the subsequent marriage of such member will have the effect of rendering such designation void. But it shall be lawful for such member to redesignate the same beneficiary. Should such member die without making a new designation, then the benefit shall be paid in accordance with a certain classification under which the benefit is payable first to the member's wife, second, to his children, etc. *Held*, that this by-law is retroactive in its

operation, and has the effect of invalidating or terminating the designation of this member's mother as his beneficiary and of substituting his wife.

The mere designation of a person as beneficiary by a member of a mutual benefit society does not confer upon the person so designated any vested right in the fund on the death of the member.

Decided February 25th, 1910.

Appeal from the Circuit Court No. 2 of Baltimore City (LEHMAYER, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

T. Howard Embert and William M. Maloy (with whom was *George M. Brady* on the brief), for the appellant.

Richard B. Tippet and *J. Royall Tippet*, for the appellee.

SCHMUCKER, J., delivered the opinion of the Court.

This is an appeal from a final decree of Circuit Court No. 2 of Baltimore City, in an interpleader case, disposing of the proceeds of a membership certificate in a mutual benefit association.

It appears from the record that on June 13th, 1897, Harry C. Mathieu, late of Baltimore City, became a member of the Order of the Knights of Columbus, which is conceded to be a mutual benefit association. In exercise of the privilege accorded to members by the by-laws of the association at that time in force, he, being then unmarried, designated his mother Mary A. Mathieu as his beneficiary and the usual benefit certificate was issued to him bearing her name as beneficiary. On June 14th, 1899, Mathieu was married to Elizabeth Deupert, and on September 27th, 1908, he died,

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leaving her surviving as his widow. He never changed the designation of his beneficiary, and the certificate remained in his possession until his death.

On August 9th, 1907, the association, in pursuance of an amendment to its charter made June 27th, 1907, by a statute of the State of Connecticut the place of its incorporation, adopted certain new by-laws of which sec. IV is as follows: "When an unmarried man or widower names or designates as his beneficiary or beneficiaries a person or persons other than his own children, or one or more of them and subsequently marries, the subsequent marriage of such member will have the effect of rendering such designation void. But it shall be lawful for such member to redesignate the same beneficiary or beneficiaries. Should such member die without making a new designation or redesignation, then the benefit shall be paid in accordance with the classification in section II, and in the order of precedence therein set forth."

Section II provided that upon the death of a member, if he had failed to designate a beneficiary or the person designated had died, or if the designation should fail "for illegality or otherwise" the benefit should be paid "to the person or persons in the following classifications and in the order of precedence as herein set forth: *first to the member's wife,*" second to his children, etc.

Upon the death of Mathieu, the association being unable to determine whether his wife or his mother was entitled to the benefits, amounting to \$1,000, due under the certificate, instituted the present interpleader suit against them and paid the money into Court. The defendants having duly interpleaded and the case having come regularly to a hearing the Court below passed a decree awarding the money, less the costs of the case, to Elizabeth Deupert Mathieu, the widow of the decedent. From that decree Mary A. Mathieu, his mother, took the present appeal.

It being admitted that the designation by Mathieu of his mother as his beneficiary was valid and in accordance with the by-laws of the association when made in 1897, the single

issue raised by the appeal is whether that designation was avoided by the changes which we have mentioned, subsequently made in the by-laws. There can be no doubt that he was subject to the legitimate operation of the by-laws of the association. That liability on his part was not only inherent in his relation of membership but he specifically stipulated in signing the required application for membership, a copy of which appears in the record, to conform to and abide by the constitution, by-laws and regulations of the association and of any council thereof of which he might at any time be a member, "which may now be in force or which may at any time hereafter be adopted by the proper authorities." He thereby consented in advance to all reasonable changes to be properly made in those laws and regulations.

The precise question which we are called upon to consider is whether sections IV and II of the by-laws adopted in August, 1908, had such retroactive operation as to invalidate or terminate the designation, made before their passage, of Mr. Mathieu's mother as his beneficiary and substitute his wife to that position.

Conceding in this connection that an amendment of the by-laws could not impair the vested rights of anyone who had not consented to it, the weight of authority is that the mere designation of a person as beneficiary by the member of a mutual benefit society does not confer upon the person so designated any vested right in the fund payable on the death of the member. 29 *Cyc.* 126; 3 *A. & E. Encycl.*, 990; *Bacon on Benefit Societies & Life Insurance*, sec. 291a, 3rd ed.; *Shipman v. Protected Home Circle*, 174 N. Y. 398; *Chambers v. Maccabees*, 200 Pa. 244; *Sabin v. Phinney*, 103 N. Y. 427. It therefore follows that Mr. Mathieu's mother having had no vested right in the \$1,000 payable on his death by the association, no objection to the validity of the amendment of its by-laws, made on August 16th, 1908, arises from the fact that she was by its operation deprived of the benefit of that fund.

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The amended by-laws imposed no hardship on the member. They gave him the right to make a new designation of his beneficiary, if he desired to do so, in all cases in which the original designation was rendered inoperative by their passage, and also made it lawful for him to redesignate the same beneficiary. It was only in the event of his failure to exercise his right of making a re-designation or a new designation that the fund became payable on his death to the members of his immediate family in the order of precedence under which his widow was first entitled to it.

The acknowledged rule of construction of legislative statutes, by which they are held to be prospective in their operation, in the absence of a clearly expressed intention to give them retroactive force, has been generally applied to the by-laws and regulations of corporate bodies. But the Courts have frequently held that by-laws of mutual benefit and similar societies, in view of the nature of the associations adopting them and the character of the by-laws themselves, operated upon and controlled the relations of existing members to the society and their rights to its future benefits although such laws were not expressed in retroactive terms. Such has generally been held to be the rule where the member has agreed to be bound by such laws as might thereafter be enacted. 29 *Cyc.*, page 75, note 55 and page 82, note 75, and cases there cited; *Gilmore v. Knights of Columbus*, 77 Conn. 58; *Fullenwilder v. Royal League*, 180 Ill. 261; *Knights of Columbus v. Rome*, 70 Conn. 550; *Pain v. Societe St. Jean, etc.*, 172 Mass. 319; *Parish v. N. Y. Produce Exchange*, 169 N. Y. 34; *Supreme Lodge v. Knights*, 117 Ind. 489; *Supreme Lodge v. LaMalta*, 95 Tenn. 157; *Eversberg v. Macabbees*, 77 S. W. 249.

The amendment now under consideration being reasonable in itself and intended to effect a modification of the benefit policy of the association that was within the scope of its original design and one in which its members generally were alike interested, we do not think that the mere fact that it was not retroactive in terms should be held to manifest an

intention on the part of the association to limit its operation to the cases of such persons only as should thereafter become members. Under such circumstances it is more rational to conclude that the intention of the association was to make the change which the amendment produced in its benefit policy applicable to its then present as well as its future membership. This conclusion applies with especial force to the case of existing members such as Mr. Mathieu who by the terms of their application for membership in effect consented in advance to such reasonable changes in the by-laws as might thereafter be made.

The decree appealed from being in accordance with the views which we have expressed will be affirmed.

Decree affirmed, with costs.

ARTHUR E. POULTNEY vs. HARRIET FITZHUGH
TIFFANY ET AL.

*Time of Vesting of Remainders After a Life Estate—Stare
Decisis—Construction of a Will—Contingent Remainders.*

When an estate is given by will or deed to become the property of the donee after the termination of a preceding particular interest therein in another person, and the question arises as to when the estate vests in interest in the donee, and as to whether it passes to his heirs in case of his death before the cessation of the preceding estate, two of the established principles of construction are, *first*, that the law favors the early vesting of estates, and the Court will, as a general rule, adopt the earlier period of vesting, when there is more than one mentioned, if not in conflict with the apparent intention of the testator; and, *second*, that notwithstanding the preference of the law for early vesting, the testator has the right to fix the period of vesting at his pleasure, and to make it depend

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upon a contingency, and when he has done this with reasonable certainty, his wishes will prevail, and the estate will not vest until the happening of the contingency.

When the particular expressions or words by which an estate in remainder was created by a will have been construed by a decision of this Court, and a definite meaning attached to them, then in a subsequent case, where the language used in another will is in effect the same, the doctrine of *stare decisis* demands that the same construction be made.

A testator gave all of his property to a trustee to hold the same and to pay the net proceeds to his wife during her life, and from and after her death, "this trust shall cease, and the property shall then become the property of all my children, in equal shares or portions, and their respective heirs, executors, administrators and assigns, the child or children of any deceased child in all cases to take the share of the parent." Some of the testator's children died before the termination of the life estate. *Held*, that the remainders to the children did not vest during the life of the testator's widow, but that they all took contingent remainders dependent upon their surviving her; that in the event of the death of any child during her life leaving issue, such issue would be entitled to the share of its parent; that since those of the testator's children who died in the lifetime of the widow left no issue, the whole estate upon her death passes equally to the surviving children.

Decided February 25th, 1910.

Appeal from the Circuit Court of Baltimore City (LEHMAYER, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

Randolph Barton and Aubrey Pearre, Jr., for the appellant.

William S. Bryan, Jr., for the appellees.

PEARCE, J., delivered the opinion of the Court.

This case requires the interpretation by the Court of the following language in the will of Thomas Poultney, Jr.: "After the payment of my just debts and funeral expenses, I give, devise and bequeath all my property, real, personal and mixed * * * unto my brother, Samuel Eugene Poultney, * * * in trust however, for the following uses and purposes, that is to say, in trust to hold the same * * * and to pay the net proceeds from time to time to my wife for and during the term of her natural life; and in trust that from and immediately after the death of my wife, this trust shall cease, and the property shall then become the property of all my children, in equal shares or portions, and their respective heirs, executors, administrators and assigns, the child or children of any deceased child in all cases to take the share of the parent."

This will was executed March 30th, 1882, and the testator died December 26th, 1903, leaving surviving him, his widow, Susan Meade Poultney, and the following children, viz, Arthur E. Poultney, the appellant, and Richard C. Poultney, children by a former marriage, who with McClellan Poultney, who died unmarried and without issue in his father's life, were the only issue of said former marriage, and Harriet Fitzhugh Poultney, now the wife of Herbert T. Tiffany, William D. Poultney and Nannie Poultney, now the wife of James P. Gorter, who with Nellie C. Poultney, who died in her father's life, unmarried and without issue, were the only issue of said second marriage. Richard C. Poultney never married, and died intestate in 1897, and Susan Meade Poultney died July 23rd, 1909, at which time, under the express terms of said will, said trust ceased.

The sole question presented on this appeal is: When did the estates devised by Mr. Poultney to his children vest in interest?

The appellant contends that these estates so vested at the death of the testator, subject to the life estate of Mrs. Poult-

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ney, and subject also to be divested by death, during her life, in favor of the child or children of the one so dying.

Under this theory, as Richard C. Poultney died intestate, and without issue, Arthur E. Poultney would take his share of the real estate under Code, Art. 46, sec. 19, and so would now have two-fifths of the real estate, the children of the second marriage each taking one-fifth, while Richard's share of the personal estate would go equally to all the children of Mr. Poultney.

The appellees contend that the children took contingent remainders, dependent upon their surviving Mrs. Poultney, and that in event of the death of any child during her life, leaving children, that the contingent remainder of such child so dying vested in his or her child or children, and that no estate vested in interest in any child of Mr. Poultney during the life of Mrs. Poultney, and that consequently, upon her death, the whole estate goes equally to the four surviving children, and the lower Court so held, and passed a declaratory decree accordingly.

The question of when an estate shall vest in interest, where there is more than one period mentioned at which it would be possible for it to vest, is one which has long perplexed the Courts, and in reference to which there has been such great diversity and confusion of judicial opinion that it would be idle to attempt to reconcile all the cases even in any one jurisdiction. Two fundamental principles of construction however have been firmly established in all jurisdictions administering the principles of the common law: first, that the law favors the early vesting of estates, and that the Courts will, as a general rule, where there is more than one period mentioned, adopt the earlier one, if this does not contravene the actual intent of the testator or donor, as deduced from the terms of the instrument; and second, that notwithstanding the preference of the law for early vesting, the testator or donor has the absolute right to fix the period of vesting at his pleasure, "and to make it depend upon a contingency, and when he has done this with reasonable certainty,

his wishes will prevail and the estate will not vest until the happening of the contingency." *Larmour v. Rich*, 71 Md. 369; and these rules are fully recognized by the counsel of both parties in this case.

While other cases are cited in both briefs, the appellees rely with special confidence upon *Larmour v. Rich*, *supra*, and the appellants, with equal confidence, rely especially upon *Cox v. Handy*, 78 Md. 108.

After a careful consideration of these cases, and of the principles upon which they are reposed, as well as the other cases cited in the briefs, we are of opinion, especially in view of the fact that the language of the will in this case is almost identical with that of the will and deed in *Larmour v. Rich*, that it must be held to be the controlling authority in this case, and we shall confine this opinion principally to an examination of the two cases mentioned above, with brief reference to some of the other cases cited. In *Cox v. Handy*, the testator devised certain property to his wife for life, and directed that after her death it shall be divided amongst my children, share and share alike, the child or children of any deceased child, to take the portion to which the parent, if living would have been entitled;" and it was held that a share of the property vested in each child who survived the testator, but if any such child should leave children at his death, his share was divested in favor of such children, but it was not divested by the death of the child in the lifetime of the tenant for life, without leaving children.

In that case, the testator mentioned his children *by name* in the will, and the Court adverts to that circumstance as indicating that the remainder was intended to be a vested remainder, and cites 1st *Preston on Estates*, 70, to show that when a remainder is limited to a person *in esse* and ascertained, to take effect, by words of express limitation on the determination of the preceding particular estate, that remainder is most clearly vested; and held that the language of the will in that case was not such as to leave room for construction, and therefore the remainders should be held to be

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vested in the children of the deceased child by way of substitution, and in a deceased child leaving no children, as the will made no provision for substitution in such a case. This result was reached because the Court was of opinion that the testator had not clearly indicated his intention to postpone the vesting in interest to the latter of the two periods mentioned and the case was thus brought within the general rule favoring early vesting.

In *Larmour v. Rich*, *supra*, the language of the deed of trust was that "from and immediately after the decease of Rebecca A. Miller (the donor's daughter) *then* in trust that the said * * * *ground and premises shall descend to and become the property* of the children the said Rebecca A. Miller now hath, and the child or children she may hereafter have, their executors, administrators and assigns, as tenants in common, equally, the issue of any deceased child, if any such issue there should be, to take and have the part, share or proportion only to which the parent of such issue would, *if living*, be entitled." The italics in this quotation are those of JUDGE McSHERRY who delivered the opinion of the Court, and who said in referring to the language of the will in that case, "that it was substantially the same, though there is some slight difference which does not however affect the question involved in this appeal." In deciding the construction of the language quoted above the Court said: "*Her death* (Mrs. Miller's) was fixed by him as the point of time at which the *corpus* of the estate 'should descend to and become the property' of her children. This is the obvious import of his words, apart from the subsequent contingencies in the same sentence, whereby he provided that his right heirs were to succeed to the estate in the event of these two contingencies happening. It was possible at the date of the deed, that either of these alternative contingencies might have occurred, but it was impossible, giving to his words their ordinary and natural signification, that the estate should 'descend to,' or 'become the property of' Mrs. Miller's children or their descendants, in any event until *her* death. Jacob Myers has, accord

ing to the plain import of these instruments indicated with *reasonable certainty*, the time at which he wished Mrs. Miller's one-seventh of the residuum of his estate under the will, and her one-half of the leasehold property under the deed to vest in her children, to 'become' their property; and that time, as he has fixed it, could never be reached during the life of his daughter Mrs. Miller. Hence if this intention is to prevail, no portion of his estate could possibly vest in any child of Mrs. Miller not living at Mrs. Miller's death."

The language of the instruments in that case cannot be discriminated from that of the present case, in so far as it relates to the question for decision in each case. In the former case the language is "shall descend to and become the property of the children of Rebecca A. Miller," and in the present case, "the property shall *then* become the property of all my children."

In this case, the death of the testator's wife, was fixed by him as the point of time at which the trust should cease, and at which the corpus of the estate should become the property of their children. "Giving to his words their ordinary and natural signification," in the language of JUDGE MCSHERRY in *Larmour v. Rich*, "it was impossible that the estate should become the property of their children or their descendants until her death."

The value of that decision in determining the present case is found in the fact that it is an adjudication of the proper legal construction to be placed upon the exact language of the present case. In the brief of the late JUDGE FISHER in *Cox v. Handy*, he says: "In no Court has the proposition been more explicitly announced, and perhaps nowhere more frequently, that in the construction of wills, little assistance is to be derived from previous adjudications, *since the language employed in two wills, is rarely coincident*, and that the only value of authority in such cases is for the ascertainment of the principle of decision."

When however the language of two wills is coincident, and when that language has been stamped by the former decision

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with a definite and exact meaning, and there is found in the latter case nowhere any ground for discriminating the one case from the other, a case is presented requiring the application of the rule "*stare decisis*."

JUDGE McSHERRY, who delivered the opinion in *Larmour v. Rich*, was the only Judge who participated in both these decisions, and no one, remembering the care and caution with which he reached conclusions as a Judge, and the steadfastness with which he adhered to a conclusion once deliberately reached, can for a moment suppose that in uniting in the opinion in *Cox v. Handy*, he receded from or qualified his opinion in *Larmour v. Rich*, or regarded these cases as in any manner conflicting, one with the other. It is apparent that he regarded the former as one in which the testator *had not* with reasonable clearness indicated his purpose to fix a later period for vesting of the remainder, and the latter as one in which the testator had so fixed the later period, and consequently the former case fell within the general rule of early vesting, and the latter within the exception to that rule.

Larmour v. Rich has been repeatedly cited with approval by this Court and among these cases we may refer specially to *Cherbonnier v. Goodwin*, 79 Md. 58, *Lee v. O'Donnell*, 95 Md. 309, and *Reilly v. Bristow*, 105 Md. 326.

When the intention of the testator has become apparent to the Court, it only remains to give it effect, unless it contravenes some fixed rule of law, and believing that the case of *Larmour v. Rich* has affixed to the language of the testator in this case the meaning and purpose ascribed to the same language in that case, it would serve no useful purpose to further prolong this opinion, and we shall affirm the decree for the reasons stated.

Decree affirmed, half the costs above and below to be paid by each side.

PATRICK H. McNULTY vs. THE KEYSER OFFICE
BUILDING CO.

*Building Contract—Architect Not Authorized to Bind Owner
by Agreement to Pay Sub-Contractor for Extra Work.*

An architect employed by an owner of land to supervise the erection of a building thereon by a contractor, according to designated specifications, and without any power to change the agreement between the owner and the contractor, is not authorized to make an agreement with a sub-contractor to do certain extra work, so as to bind the owner to pay the sub-contractor therefor.

Decided February 25th, 1910.

Appeal from the Court of Common Pleas (ELLIOTT, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

R. B. Tippet, for the appellant.

Charles McH. Howard and *Frederick C. Colston*, for the appellee.

PEARCE, J., delivered the opinion of the Court.

This is an action of assumpsit brought by the appellant against the appellee to recover the sum of \$1,200 for plastering certain beams in the office building of the defendant. The declaration contained only the common counts, to which the general issue was pleaded and the only exception taken in the case was to the granting of a prayer offered by the defendant at the close of the plaintiff's testimony, instructing the jury

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“that no legally sufficient evidence had been offered to show that Wyatt and Nolting, the architects, were authorized to bind the defendant by any contract or agreement with the plaintiff whereby the defendant was to be, or become liable to the plaintiff for the alleged extra work on the Keyser Building for which this suit is brought, or that any such alleged contract or agreement, if made by said architects was subsequently ratified by the defendant, and that therefore their verdict must be for the defendant.”

The defendant is a corporation owning a lot in the city of Baltimore, and on March 9th, 1905, entered into a written contract with the Broderick and Wind Engineering and Construction Company, a corporation, for the erection by said last named company of an office building upon said lot, at a cost of \$288,000, subject to additions and deductions as provided in said contract.

This contract is known among owners and builders as “The Uniform Contract,” and is the form adopted and recommended for general use by the American Institute of Architects, and the National Association of Builders, and it bears that information at the head of the contract.

Art. 1 of this contract provides that “the contractor shall and will provide *all the materials* and perform *all the work* for the erection and completion of said building, as shown on the drawings and described in the specifications prepared by Wyatt & Nolting, architects,” and made part of said contract.

Art. 2 provides “that the work included in this contract is to be done under the directions of the said architects.”

Art. 3 provides that “no alterations shall be made in the work except upon *written order of the architects*; the amount to be paid by the owner, or allowed by the contractor, by virtue of such alterations, to be stated in said order.”

Art. 8 provides “that owner agrees to provide all labor and materials essential to the conduct of this work, not included in this contract, in such manner as not to delay its progress, and in the event of failure to do so, thereby causing

loss to the contractor, agrees that he will reimburse the contractor for such loss."

It is unnecessary for the purposes of this case to refer here to any of the other provisions of that contract.

The Broderick and Wind Company, the *general contractor*, on April 5, 1905, entered into a written contract, with the appellant, McNulty Brothers, of New York City, designated in said contract as *sub-contractor*, by which the appellant became bound "to provide all the materials and perform all the work mentioned in the specifications and drawings prepared by the said architects, and identified by the signatures of the parties hereto for the installation and construction of the plastering" in said building, and an exact duplicate of all the specifications relating to said plastering, as annexed to the contract between the Broderick and Wind Co. was also annexed to, and made a part of, said sub-contract. Paragraph 3 of this sub-contract provides that "it is further understood and agreed that the sub-contractor shall not, under any circumstances, be entitled to allowance for any extra work, unless the sub-contractor shall produce a written order to do such extra work, signed by a properly authorized officer or agent on behalf of the contractor."

Paragraph 15 provides that "no alterations shall be made in the work shown or described by the drawings and specifications, except upon a written order of the contractor, and when so made, the value of the work added or omitted shall be computed and the amount so ascertained shall be added to, or deducted from the contract price."

This sub-contract contains many of the exact provisions of the general contract, differing only in so far as is necessary to conform to the difference of parties and the times of performance.

The only witnesses in the case were James R. Broderick, a representative of the Broderick-Wind Co. and Patrick McNulty.

During the progress of the work a question arose as to whether McNulty's contract required him to plaster certain

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beams projecting below the ceiling line. It appears from Broderick's testimony that the drawings did not show the projection of these beams, but it also appears that he made no charge for them as extra work and material against the defendant, and received no allowance for them. The architects required these beams to be plastered as within the terms of the contract, and at their request Broderick obtained from McNulty Bros. an estimate of the cost of plastering the beams, viz, \$1,200, being the actual cost of the work without profit. The Broderick and Wind Co. refused to allow McNulty Bros. anything extra for that work, because as Broderick testified: "It was not in our original contract; it was clearly an extra and it was up to McNulty to take it up with the architects to secure an allowance for that work;" and that he informed the architects of the refusal to allow McNulty anything on his contract. Both Broderick and McNulty testified that the latter refused to plaster these beams until he knew who was to pay for the work, and that the matter was in controversy for sometime until an interview was had between Broderick and himself and Mr. Nolting, one of the architects, "at which Mr. Nolting said the work would have to be done, no matter who did it; that the building could not be completed unless it was done; that McNulty should go ahead and finish it up, and that if it was extra, Mr. Nolting would see he was properly paid for the work." This was Broderick's language. McNulty's language was that "he told Mr. Nolting he did not propose to go on with it until he knew who was going to pay for it, and that Nolting said the work had to go on, and if, as I stated the plans did show the beams projecting below the ceiling, to go ahead with the work and he would see we were paid for it."

Broderick further testified that at the conclusion of this interview he asked Mr. Nolting to verify what had been agreed to in writing so that he would have an order for it as a matter of record, and he agreed to this, but one excuse after another was made for not doing so and it went along that way until Mr. Nolting went away on his vacation, and while he

was away the work was finished and the order was never written.

An itemized bill rendered by the Broderick and Wind Co. to the defendant was put in evidence in which this item of \$1,200 for plastering these beams was contained, but the bill shows this item was stricken out and Broderick admits this was done by the architects, and that the bill, after this item was eliminated, was marked "approved" on June 29, 1906, by the Broderick-Wind Co. and by the architects.

An itemized bill rendered by McNulty Bros. to the Broderick and Wind Co. was also put in evidence containing this item of \$1,200, and McNulty testified that he had no account against the defendant and that this item was charged on his books to the Broderick and Wind Co. and not to the defendant.

It was also shown that McNulty in July, 1908, issued an attachment against Broderick and Wind Co. for a balance claimed to be due, including this \$1,200, but that it was afterwards withdrawn, and a settlement was made between them, excluding this item, which was expressly reserved by the plaintiff as against this defendant.

The question of law presented by the prayer granted in this case, is whether under this contract, and upon the facts in this case, the architects had the power to bind the defendant by the alleged agreement with the sub-contractor to pay for this alleged extra work.

This question ought not to be, and we do not think is, difficult of solution.

The principle upon which it must be decided is clearly stated in 6 Cyc. 29, where it is said: "The mere fact that a person is employed as architect, does not constitute such person a *general agent* of his employer, *his powers as agent being limited by the contract entered into between them*. Thus unless specially authorized, he is not entitled to change, alter or modify the contract entered into by the builder and his employer, nor has he any authority to bind the owner by

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contracts for any work done or materials furnished for the structures concerning which he is employed."

And in 2 *Amer. & Eng. Enc.*, page 821, 2nd Edition, it is said: "He cannot employ another to do work which the contractor has undertaken, or substitute a sub-contractor for the principal contractor, either in the performance of the work, or the payment therefor." In accord with this statement of the law is the case of *Baltimore Cemetery Co. v. Coburn*, 7 Md. 202. Coburn had agreed to erect a gateway for the Cemetery Co. at the entrance of the cemetery, and the written contract between them provided that "should any alteration be contemplated from the design it may be done, provided the parties beforehand agree upon the price and endorse it upon the contract, and unless such agreement be also entered, it is to be taken to be an agreement to make the alteration without any change in price of the original contract." The architect directed two windows to be placed in the gateway which he deemed necessary to its symmetry and beauty in consequence of the two chimneys being placed in a position different from that contemplated by the original plan, and Coburn sued to recover for this extra work. In refusing to allow Coburn to recover, JUDGE TUCK, speaking for the Court, said: "It is impossible to conceive the use for inserting any such provision, if it is to have no effect in a case like the present. Owners are very much in the power of builders and architects. Changes, apparently unimportant, are often made, the first knowledge of which comes to the owner in the shape of an additional charge for extra work. It may have been to prevent this, and the controversy that often arises from verbal arrangements suppletory to written agreements, that the parties had this cautious provision inserted. It was a clause for the benefit of both, especially for that of the owner. If the plaintiff, relying on the assurance of the architect, chose to perform this work without placing it within the protection afforded to the parties by the contract, he must bear the consequences * * * The witness was appointed merely to superintend the work according to the

plan, with such alterations as the parties might have agreed upon. As such superintendent he had no power to bind the company by promises in their name, whatever he may have thought of the extent of his authority. Indeed the inference from his testimony is that the plaintiff looked to him, and not to the company, for he nowhere says that he promised the defendants would pay for the work, but that he would see the plaintiff paid what the windows were worth." These observations are so sensible and convincing, and the case so analogous to the one before us, that if it stood alone it might well be confidently relied on as decisive of the principle to be invoked. If here the Broderick and Wind Co. were suing the defendant for this work, they having paid the sub-contractor for it, or if the plaintiffs were suing the Broderick and Wind Co. for this work, the contract between them being in this respect identical with that between the Broderick and Wind Co. and the defendant, it is obvious that there could be no recovery, without evidence of the written order or agreement for the alteration or clear proof of a waiver of that requirement by the party itself, sued in either of the above supposed cases.

But there is not a particle of evidence in this case that the architects had any other agency or authority from the owner than to see that his contract with the builder was performed literally as made, or that the defendant did or said anything that could operate as a waiver of the protection afforded by the requirement of a written order from the architects, approving the work, and specifying the cost. There is a total absence of any privity between the plaintiff and defendant. Moreover, even if there were any evidence of waiver, and their liability would only be to the Broderick and Wind Co., who in that event, and upon payment to them, would become liable to the present plaintiff.

Coburn's case was cited and approved in the oft cited case of *Abbott v. Gatch*, 13 Md. 330, in which the Court said: "To hold a party liable in the face of such a stipulation. would be to turn his plain words into something that he had

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not assented to." And in *O'Brien v. Fowler*, 67 Md. 565 JUDGE ALVEY said: "The very object in the stipulation in the contracts was to exclude such extra work *except* upon the condition prescribed," citing *Coburn's Case*, and *Abbott v. Gatch*, *supra*.

In *Mallard v. Moody*, 105 Ga. 400, a case very similar to the present, it was said that authority to decide disputes respecting construction does not authorize the architect to dispense with any substantial provision of the contract.

There is collected in the excellent brief of the defendant a number of analogous cases which thoroughly sustain the case of *Baltimore Cemetery Co. v. Coburn*, *supra*. Among these may be specially mentioned *Campbell v. Day*, 90 Ill. 363, in which the law was laid down accurately and clearly in the instruction given by the Court and sustained on appeal, and it should be noted that the Court instructed the jury that even if they should believe from the evidence that it was necessary to remove certain brick piers and replace them with stone, that fact could not authorize the architect to bind the owners by employing a sub-contractor to do the work, and to the same effect are *Stuart v. Cambridge*, 125 Mass. 102; *McIntosh v. Hastings*, 156 Mass. 344; *Vanderwercker v. Vermont Central R. R.*, 27 Vt. 125, and *Dodge v. McDonnell*, 14 Wisconsin, 553.

The appellant however claims that the effect of Art. 7 of the contract with the Broderick and Wind Co. was to confer implied authority upon the architect to bind the defendant by his direction to McNulty Bros. to do this work.

Art. 7 provides that, "Should the contractor be delayed in the prosecution or completion of the work by the act, neglect or default of the owner, of the architects, or of any other contractor *employed by the owner* on the work * * * then the time fixed herein for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all the causes aforesaid. But it is obvious that such effect cannot be given to that clause. It has no reference to extra work whatever. It was not, and could not have been,

invoked by the Broderick Co., first because there is no evidence it was delayed, and also because if it had been so delayed, no claim in writing for an extension of time was made as provided in Art. 7.

In support of this contention the appellant cites *Teackle v. Moore*, 131 Mich. 427, where the contract provided for written orders for extra work to be signed by the architects, who verbally directed a sub-contractor to put up a scaffold not embraced in the contract, but necessary after the fall of a roof in order to prevent delay to the contractor in the completion of the contract, and the Court held that under the circumstances, the architects bound the owner to pay therefor. But an examination of that case shows that it differs from the case before us in two important particulars. In *Teackle v. Moore*, there was no clause in the contract similar to paragraph 15 in the present contract. The language of *Teackle v. Moore* upon this point is this: "Should any alteration be required in the work shown or described in the drawings and specifications, a fair and reasonable valuation of the work added or omitted shall be made by the architects, and the sum herein agreed to be paid for the work according to the original specifications shall be increased or diminished as the case may be," *but no written order of the architects is required*. Again, in that case, the architects are described in the contracts, generally and broadly, as "*acting as agents of said owner*," and the Court adverts to that fact, saying: "The architects were *acting for the owner* in all the contracts."

So in *Seymour v. Long Dock Co.*, 20 N. J. Equity 396, the language of the contract was. "work to be done under the direction and constant supervision of the engineer of the company by whose measurements and calculations the *quantity and amount of the several kinds of work performed under the contract* shall be determined," and the Master, sitting for the Chancellor, said that in view of this broad language, and of a further provision in the contract that the contractor "was entitled to rely on 'the instructions and corrections of the engineer within the scope of his authority,' the loss occa-

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sioned by extra work verbally ordered by the engineer, ought not to fall upon the contractor, but upon the company."

In *Commissioners v. Hill*, 122 Ind. 215, not only the engineer, but the chairman of the Board of Commissioners also approved the extra work and promised to pay for it.

The case of *Erskine v. Johnson*, 36 N. W. 511, comes closer to sustaining the appellant's contention in this case than any other cited, but when closely scrutinized it seems to be placed upon the ground of *waiver by the defendant*, since the Court says, speaking of the requirement of a written order for extras: "This provision may be waived *by the parties*." If however it was designed by the Court to mean that an architect in such a case as this can waive such provision, we are not prepared to yield our assent to that doctrine.

We can discover nothing whatever in the evidence to sustain the doctrine of holding out invoked by the appellant. His own contract with the Broderick and Wind Co. informed him that they were general contractors for the erection of the building, and that Wyatt & Nolting, were the architects who were to supervise the performance of both contracts. He was thus put upon guard to ascertain the extent of the architects' authority under the principal contract, which it cannot be doubted would have been exhibited to him on his request, by the Broderick and Wind Co. and if he chose to act without using the means at hand to inform himself he must bear the consequences. But further, the evidence shows that Broderick told him he could not allow him for this work because under their contract with defendant they could get no allowance without a written order from the architects, and the appellant thus had both constructive and actual notice of the limits of the authority of the architects. The appellant testified frankly and without any attempt to bolster up his case on this theory. Indeed, neither he nor Broderick testified to any word or act on the part of the defendant which could operate as, or suggest, an estoppel by holding out the architects as having any other or further authority than the limited authority conferred in the principal contract, and we do

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not deem it necessary to pursue this question further. It necessarily follows from what we have said that the prayer of the defendant was properly granted.

Judgment affirmed, with costs to the appellee above and below.

COLONIAL PARK ESTATES vs. HENRY MASSART.

Memorandum of Contract of Sale of Land—Signed Paper Not Intended to be a Contract—Action to Recover Money Paid on Account of Purchase of Land—Evidence.

Plaintiff, upon making an oral agreement to purchase certain lots of ground, asked to see the kind of contract he would be required to sign, and the vendor showed him a certain printed blank form of contract. After reading it he expressed his satisfaction and paid \$250 demanded as the first payment. At the request of the vendor, he signed a paper containing a reference to the numbers of the lots in question and the direction to have the deed made in his own name. Subsequently he was asked to sign a form of contract for the purchase containing provisions materially different from those contained in the printed form exhibited to him. This he refused to do and brought this action to recover the sum so paid. *Held*, that if these facts are found by the jury, the paper so signed by the plaintiff is not a sufficient memorandum of the contract of sale under the Statute of Frauds, and he is entitled to recover back the money so paid by him.

Although parol evidence is not admissible to contradict or vary the terms of a written contract, yet it is admissible to show that what appears to be a written agreement was not intended as such by the parties.

If the vendor and the purchaser agree to rescind their contract for the sale of land, the purchaser is entitled to recover a sum of money paid by him on account of the price.

When the question is whether a paper signed by the plaintiff was intended by the parties to be a binding contract, plaintiff may testify as to reasons given by the defendant for the signing of the paper.

Decided February 25th, 1910.

Appeal from the Superior Court of Baltimore City (NILES, J.).

Plaintiff's 7th Prayer.—That the letter of July 10th, 1908, written by the defendant to the plaintiff, offered in evidence, taken together with the failure of the defendant to make any demand upon the plaintiff for the payment of the monthly instalments of \$30 mentioned in the paper writing bearing date July 3rd, 1908, and the failure of the defendant to tender to the plaintiff, a good and sufficient deed conveying the three lots mentioned in said paper writing to the plaintiff, amounts in law to acquiescence on the part of the defendant in the rescission by the plaintiff of his agreement to purchase said lots and there being no evidence of any damage to the defendant through the rescission of said agreement on the part of the plaintiff, and their verdict must be for the plaintiff. (*Refused.*)

Plaintiff's 7th Prayer as Modified.—That even although the jury may find the facts set out in the defendant's second prayer as modified, which are therein stated to constitute a contract entered into by the plaintiff and defendant, as evidenced by the paper writing dated July 3, 1908, offered in evidence; still, if the jury further find that the defendant, after the receipt by it of the letter written to it by the plaintiff and dated July 9th, 1908, if the jury shall so find, acquiesced in the rescission by the plaintiff of the said agreement and consented to a rescission of said agreement and only reserved its right to hold the plaintiff for such damages as it might suffer by reason of such rescission, then their verdict must be for the plaintiff for the deposit of \$250, if the jury

shall so find, and interest in their discretion from the 9th day of July, 1908, there being in this case no evidence of any damage to the defendant through the rescission of said agreement on the part of the plaintiff. (*Granted.*)

Defendant's 2nd Prayer.—If the jury find from the evidence that the defendant sold to the plaintiff the three lots of ground mentioned in the memorandum of agreement offered in evidence in this case and signed by the plaintiff, and if the jury shall find that the defendant was ready and able to perform its part of the said agreement, then the verdict of the jury must be for the defendant. (*Refused as offered.*)

Defendant's 2nd Prayer as Modified.—If the jury find that the plaintiff signed the paper dated July 3, 1908, and that prior to said signing, the plaintiff had been shown by an agent of the defendant three lots, which were identified to said plaintiff by the defendant's agent as lot numbers 3, 4 and 5, in section Q on a plat of the defendant's property, and if the jury shall further find that said lots were plainly staked off, and that the plaintiff walked over said lots and saw their boundaries, and if the jury shall further find that the plaintiff asked the agent of the defendant as to the rules prescribed by the defendant for purchasers of its lots, and was shown by said agent of the defendant a printed form of deed or contract containing certain rules and restrictions, then a contract of sale was entered into between the plaintiff and the defendant whereby the plaintiff agreed to buy, subject to the rules contained on the printed form of deed or contract shown to the plaintiff as aforesaid, if the jury shall so find, the lots numbers 3, 4 and 5 in section Q on the plat of defendant's property, for the price of \$4,000, payable at the rate of \$30 per month; and if the jury further find that the plaintiff wrote the defendant the letter of July 9, 1908, offered in evidence, then their verdict must be for the defendant, provided the jury shall further find that the said defendant has ever since the 3rd day of July, 1908, been ready and able to convey to the plaintiff the lots mentioned in the said paper writing, subject only to the rules set forth in the blank printed

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deed or contract shown to the plaintiff as aforesaid, if they shall so find; and provided the jury shall further find that the defendant did not consent to the rescission of the contract, reserving only its right to hold the plaintiff for damages, as set out in the plaintiff's 7th prayer, as modified. (*Granted.*)

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

R. B. Tippet and *J. Royall Tippet*, for the appellant.

J. Kemp Bartlett and *R. H. Bland* (with whom was *L. B. K. Claggett* on the brief), for the appellee.

SCHMUCKER, J., delivered the opinion of the Court.

The appellee sued the appellant in the Superior Court of Baltimore City on the common counts in assumpsit. The trial of the case upon the general issue pleas resulted in a judgment for the plaintiff from which this appeal was taken.

The record discloses the fact that the purpose of the suit was to recover from the defendant company the sum of two hundred and fifty dollars which the plaintiff, Henry Massart, had paid to it on account of a proposed purchase, of three lots of ground, which he contends was never consummated. It appears from the evidence that Massart, having seen an advertisement by the company offering for sale lots in a tract of land on the outskirts of Baltimore City which it was engaged in developing under the name of the "Colonial Park Estates," visited the property on July 4th, 1908, where he met Mr. McCoy the selling agent of the company. Mr. McCoy took him over the property explaining its attractions and gave him a sales plat of it indicating to him the various lots which had already been disposed of and those remaining unsold. Massart became much interested in the property and on the next day he called up McCoy by phone to ascertain whether he could buy the lots designated on the plat as Nos.

3, 4 and 12. He was informed that lot No. 12 had been sold, whereupon he expressed his willingness to pay \$4,000 for lots 3, 4 and 5. McCoy replied that he could not accept that price but invited Massart to come out to the property again and see him at the same time expressing the hope that they would be able to come to mutually satisfactory terms.

The next day, July 5, Massart again visited the property and after examining the sales plat which showed the dimensions and location of the several lots, and looking over the land and making some calculations as to the area contained in lots 3, 4 and 5, he made a verbal offer for them of \$4,000 to be payable \$250 in cash and the balance in weekly instalments of \$30 each. McCoy, after consulting the president of the company, accepted the offer and asked for the cash payment of \$250, but Massart, according to his testimony declined to make any payment until he was shown a sample of the contract the company would make with him for the lots. McCoy at first said he had no sample with him but, upon the insistence by Massart on seeing the kind of contract he would have to sign, before he would make any payment, McCoy produced and gave to him a printed blank form of contract containing quite a number of provisions and restrictions such as are usual in suburban real estate developments. Massart went over the contract and, after discussing some of its provisions with McCoy, who promised to bring it to him next day to sign, he expressed himself as satisfied and paid the company the \$250 cash payment.

When he had made the payment McCoy filled up and handed to him what he says he supposed was a receipt for the money, at the foot of which he without reading the paper signed, at McCoy's suggestion, the direction for making out the deed. The paper so handed to him at that time is as follows:

"No lots reserved or held. No verbal agreement recognized by the company. All sales are subject to the rules and acceptance of the company.

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BALTIMORE, July 3, 1908.

M. Henry Massart.

W. P. McCoy.

To Colonial Park Estates of Baltimore City, Dr.

C. & P. Phone, St. Paul 3119. Offices: 763-769 Calvert Bldg.

3 Lots No. 3-4-5 Sec. Q. Price, \$4,000.00....\$4,000.00

First payment, two hundred fifty dollars..... 250.00

 Balance due.....\$3,750.00

To the General Manager of Colonial Park Estates—

Please make deed for above lot Term \$30 per month
 in the name of
 and

Signed by payer:

H. MASSART.

Address of Payer:

617 St. Paul St."

Offer

accepted

July 6, 1908,

JOHN J. WATSON,

President."

It appears from the record that this memorandum was in fact signed by Massart on July 5th, although bearing date as of the 3rd, and that the memorandum of acceptance was signed by Watson on the 6th as therein stated.

The account given by McCoy in his testimony of what transpired between him and Massart on the two visits of the latter to the property on July 4th and 5th respectively substantially agreed in most of its details with that of Massart, but he said in reference to what occurred at the time of making the cash payment: "I communicated the acceptance of the offer to Mr. Massart and a memorandum of the agreement was drawn up on a paper and Mr. Massart gave me a check for two hundred and fifty dollars (\$250) to bind it. I went over the restrictions with Mr. Massart and he asked if they were reduced to writing and I said they were. He asked for a form of contract a form of paper that had all of these provisions in. Of course each particular lot required a

special set of papers but there was a general form used." McCoy further testified that he had fully explained to Massart all of the restrictions and that the latter knew all about it.

On the morning after the payment of the \$250 McCoy took to Massart's office, for signature by him, a formal contract for the purchase of the lots. That contract was drawn upon a form of the kind shown to Massart on the previous day when he paid the money, but there had been inserted into the blank spaces of the printed form several very material provisions imposing additional burdens and restrictions upon the lots. One of these provisions made the lots liable in perpetuity for a proportionate share, not exceeding six dollars per annum on every dwelling to be erected on them, of maintaining a sewerage system; another reserved to the company the right to lay sewer and water pipes, erect and maintain poles for electric lighting and heating purposes on the rear line of the lots; still another contained minute and stringent conditions prohibiting the construction or maintenance of privies or vaults or cesspools for the storage of any kind of liquid waste on any portion of the lots.

When this contract was tendered to Massart for signature he, according to his testimony, asked Mr. McCoy to leave it with him so that he could study it. A few days thereafter he notified the company that he had decided not to buy the lots and requested the return of the \$250 which he had paid to it. Not receiving the money he brought the present suit and recovered a verdict for the full amount with interest.

It appears from the record that Massart when refusing to sign the contract for the purchase of the lots assigned as his reason for so doing only that as he lived in France he thought it unwise to bind himself up here in such an engagement. When he was on the witness stand he also assigned as reasons for not making the purchase that the lots tendered him contained smaller areas than those shown on the plat exhibited and given him at the time of the alleged purchase, as well as that the contract tendered him for signature was materially

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different in its provisions from the one shown him when he paid the deposit. We do not discuss those features of the case because, in the view which we take of it, they are not material to the issue except in so far as the plaintiff's statements in that respect might influence a jury in passing upon the credibility of his testimony.

The substantial contention of the appellant is that the paper handed by McCoy to Massart when the \$250 were paid constituted a sufficient note or memorandum of the sale within the Statute of Frauds and that the signing by Massart at its foot of the direction to make the deed in his name made the purchase binding upon him, and that he is therefore not entitled to maintain the present action for the recovery of the money. Without pausing to consider whether that paper would have constituted a sufficient memorandum of the sale to bind Massart as purchaser if it had been signed by him with the purpose and intention that it should constitute such a memorandum, we think that if the money was paid by him as he testified that it was under the distinct understanding that the sale was to be made upon the terms set out in the printed form of contract then given to him and further that a contract therefor upon those terms was to be furnished him for execution on the following day, the paper which he signed should not be regarded as a binding memorandum of a contract of sale of the lots.

Although parol evidence is inadmissible to vary or contradict the terms of a written agreement, it is well settled that such evidence is admissible to show that a particular written paper "was never intended as a contract as the binding record of a contract between the parties." And this has been held to be true even though the paper writing in question be in the form of a contract and bear the signatures of those named in it as the contracting parties. We distinctly held this to be the law upon the authority of many cases both English and American cited by us, in the *Southern Advertising Co. v. Metropole Co.*, 91 Md. 61-8.

The Supreme Court of the United States in *Burke v. Dulaney*, 153 U. S. 234, upon a review of the cases upon this subject, reached the conclusion there stated in its opinion that, "The rule that excludes parol evidence is contradiction of a written agreement presupposes the existence in fact of such an agreement at the time the suit is brought. But the rule has no application if the writing was not delivered as a present contract, and parol evidence was admissible to show that there never was any concluded binding contract entitling the party who claimed the benefit of it to enforce its stipulations."

The *Southern Advertising Co.'s Case* has recently been affirmed by us in *Birely & Sons v. Dodson*, 107 Md. 233, and the principle upon which it rests has been recognized and relied on in many cases in other jurisdictions among which are *Ware v. Allen*, 128 U. S. 590; *Adams v. Morgan*, 150 Mass. 148; *Nutting v. Minnesota Ins. Co.*, 98 Wis. 32; *Reynolds v. Robinson*, 110 N. Y. 654; *Pollock on Contracts*, 236; *Clark on Contracts*, 62.

If therefore the jury in the present case believed Massart's testimony as to the circumstances and understanding under which the \$250 were paid to him by the company and the memorandum or receipt handed to him by its agent McCoy was signed, that writing did not constitute a sufficient memorandum of a sale under the Statute of Frauds and there was no binding contract of sale between the parties and the plaintiff was entitled to recover back the money so paid by him.

Examining now, in the light of what we have said, the rulings of the Court below, which the appeal brings up for review, we find thirteen bills of exceptions in the record. Of these twelve were to rulings on evidence and one to the Court's action on the prayers. At the close of the case the plaintiff offered seven prayers all of which were rejected as offered, but the seventh was granted with certain modifications. The defendant offered five prayers all of which were rejected as

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offered, but its second prayer was granted after having also been modified by the Court.

There was no error in granting the plaintiff's modified seventh prayer which in effect asserted that even if the jury found, under the defendant's modified second prayer, that the memorandum, signed on July 5th when the \$250 were paid, was a sufficient contract of sale to bind the plaintiff, still their verdict must be for the plaintiff if they further found that the defendant subsequently acquiesced in and consented to a rescission of said contract.

Nor do we find any error in the rejection of the four of the defendant's prayers which the Court refused to grant. The first of those prayers asked the Court to take the case from the jury for want of legally sufficient evidence to entitle the plaintiff to recover. The third, fourth and fifth were each predicated upon the assumption that the memorandum of July 5th constituted a valid contract of sale of the lots, instead of leaving it to the jury to find from the evidence that it was intended by the parties to constitute a contract of sale or a written memorandum thereof. The defendant's second prayer as offered had the same defect as the three last mentioned ones, but the modification of it made by the Court before granting it relieved it of that vice. We regard that prayer in its modified form as rather more favorable to the defendant than the case as presented by the record warranted, but of that the defendant cannot complain.

No reversible error appears in the rulings of the learned judge below upon the admissibility of evidence. The first four exceptions relating to those rulings refer to questions of preliminary character having no direct bearing upon the issue in the case and the answers to them were of such character as to do the defendant no injury.

After the plaintiff had testified in his own behalf, in the manner already mentioned by us, in reference to the payment of the \$250 on July 5th and the handing to him, for his signature at that time by McCoy of the written memorandum, he was asked: "What did he say you were signing the paper

for?" The Court allowed him to answer it over the defendant's objection and the fifth exception was taken to that ruling. The witness answered: "I didn't ask any thing about it but took it as a receipt for two hundred and fifty dollars." We think in view of the evidence already in the case at that time the testimony in question was properly admissible as part of *res gestae* and as tending to show that the written paper referred to was not intended to constitute a contract of sale or a memorandum of one. That paper does not on its face purport to be such a memorandum but to be a bill or statement of account charging Massart with \$4,000 as the price of the lots, crediting him with the \$250 paid by him and striking a balance. All that he signed was a printed direction at the foot of the paper indicating in whose name the deed was to be drawn when the time for preparing that the instrument arrived. In view of his testimony that the money was paid after the promise to him that a contract of sale of a particular charter containing the full terms of the proposed purchase was to be executed, and of the further fact that on the next morning a written contract was tendered him by the company for execution, the admission of the testimony was especially appropriate.

The sixth, seventh and eighth exceptions all related to questions as to the absence, from the form of contract shown by McCoy to the plaintiff on July 5th as containing the terms of a proposed sale, of sundry provisions which appeared in the contract tendered to the plaintiff for signature on the following day. Those exceptions were rendered immaterial by the admission of counsel in open Court at the hearing of the appeal that the difference between the two forms of contract was in accordance with the contention of the plaintiff. We deem it unnecessary to refer to the remaining four exceptions to testimony further than to again state that we find no reversible error presented by them.

For the reasons stated in this opinion the judgment appealed from will be affirmed.

Judgment affirmed with costs.

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Syllabus.

JAMES W. STEVENS vs. JAMES F. CLARK.

Construction of an Agreement for Dissolution of Partnership.

C. and S., partners, who were the lessees of a warehouse, filed a bill against the landlord claiming to be reimbursed for the expenses paid by them in taking down and rebuilding a part of the premises which had been condemned by the Inspector of Buildings. At the time of the rebuilding the partners erected certain fire shutters. Pending the decision of this case, the partnership was dissolved under an agreement by which C. paid to S. a sum of money for all his interest in the property of the firm, and S. assigned to C. his interest in the leased premises. It was agreed that all liability of the firm to the landlord under the pending case should be equally shared, and that all claims that might be recovered by the firm from him should be equally divided. It was finally decided in that case that the landlord was liable for all the expenses paid by the firm in rebuilding the warehouse except the cost of the fire shutters, which had been supplied with a view to the insurance on the property. *Held*, that S. had transferred all his interest in the fire shutters to C. under the agreement for dissolution, and now has no right to demand that C. should pay one-half of the cost thereof.

Decided March 2nd, 1910.

Appeal from the Circuit Court of Baltimore City (HEUSLER, J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

Frederick W. Story, for the appellant.

Charles W. Field, for the appellee.

BURKE, J., delivered the opinion of the Court.

It appears from the record that the parties to this suit prior to the 30th day of September, 1905, were engaged in business as partners in the city of Baltimore under the firm name of Clarke & Stevens, and on that date they entered into an agreement by which the partnership existing between them was dissolved and terminated as of the 20th day of September, 1905. It was agreed that Clarke should retain as his own property all the stock in trade, merchandise, book accounts, bills receivable and all other assets of the firm of every kind and description, including the lease then held by the firm upon the property No. 5 West Lexington street from Elizabeth V. Gerke and others; that he should assume and pay at maturity all debts and liabilities of the firm of every kind and description, including the rent then due or thereafter to become due under the lease, and all liabilities under the lease that might ever thereafter accrue against Clarke & Stevens. Clarke agreed to pay to Stevens in full settlement of his interest in the firm the sum of six thousand seven hundred and fifty dollars. By the fifth clause of the agreement it was provided as follows: "It is, however, expressly agreed that all liability of said firm to Elizabeth V. Gerke *et al.*, if any, under the cause now pending in the Circuit Court of Baltimore City, shall be equally shared, including the expenses of said cause, by said Clarke & Stevens; and on the other hand, all profits or claim that may accrue to, or be recovered by said Clarke & Stevens against said Elizabeth V. Gerke *et al.*, under said cause, shall be equally divided between said Clarke & Stevens, to as full an extent as if they had remained co-partners; anything in this agreement to the contrary notwithstanding." It was further agreed that Stevens should assign to Clarke all his right, title and interest in the lease of the warehouse then occupied by the firm, and also all his right, title and interest in any unexpired policies of fire insurance on the stock and fixtures of the firm.

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On the same day James W. Stevens executed and delivered to Clarke the deed provided for in the agreement. This deed recited that Stevens "does hereby grant, assign and convey unto the said James F. Clarke all his, said grantor's right, title and interest in and to the lot of ground and premises No. 5 West Lexington street, heretofore leased by Elizabeth V. Gerke *et al.* to said James W. Stevens and James F. Clarke, co-partners, trading as Clarke & Stevens, by lease dated October 31st, 1903, and recorded among the Land Records of Baltimore City, in Liber R. O. No. 2045, folio 97; and all right, title and interest that said Stevens now has, or hereafter may have in said lease or property or premises or policies of insurance covered thereby."

On the day the deed was made the parties entered into the following agreement, which was filed in a case of James F. Clarke and James W. Stevens, co-partners, trading as *Clarke & Stevens v. Elizabeth V. Gerke et al.*, then pending in the Circuit Court of Baltimore City: "The plaintiff, James W. Stevens, having this day assigned and conveyed to the plaintiff, James F. Clarke, the lease mentioned in these proceedings and all interest therein by deed recorded or intended to be recorded simultaneously herewith; it is hereby agreed between the plaintiffs respectively, in consideration of said assignment notwithstanding said assignment, that the interest of said plaintiffs, and the interest and obligations of said plaintiffs respectively in the matters, rights and obligations at issue in this cause shall remain unaffected by said assignment until this cause shall be terminated."

An appeal to this Court was taken by the plaintiffs from the order of the Circuit Court of Baltimore City ratifying an auditor's account filed in the case of *Clarke & Stevens v. Gerke et al.*, above referred to. The order from which that appeal was taken was dated the 1st day of March, 1906, and the case was decided by this Court on December 19th, 1906. It, therefore, appears that at the time the agreement and deed referred to were concluded neither this Court, nor the Court below had passed upon the issues involved in that case.

After the case had been decided by this Court (*Clarke & Stevens v. Gerke*, 104 Md. 504), in obedience to the mandate of this Court the lower Court entered a decree against the defendants in favor of the plaintiffs for the sum of five thousand eight hundred and seventy-four dollars with interest from the date of the decree. It also decreed that the defendants pay to the plaintiffs all the costs of the suit incurred in that and in this Court upon the appeal. The defendants paid the amount specified in the decree, and also paid the costs, and these amounts were equally divided between Clarke & Stevens as provided in the agreement. Afterwards, on November 19th, 1908, James W. Stevens filed a petition in the case of *Clarke & Stevens v. Gerke et al.*, asking that the papers in the cause be referred to the Auditor to state an account between him and Clarke in accordance with the terms of the agreement filed in the cause on the 30th day of September, 1905. The papers were referred as prayed, and testimony was taken by the Auditor upon the subject-matter of the petition which related to a liability asserted by Stevens against Clarke for one-half of the costs of fire shutters which had been placed by the firm of Clarke & Stevens upon the leased premises No. 5 West Lexington street, the total cost of these shutters to the firm being seven hundred and sixty-one dollars and seventy-five cents. The Auditor's report and account denied and rejected this claim. The appellant filed exceptions to the account, but the Court on the 23rd of March, 1909, overruled the exceptions, and finally ratified and confirmed the report and account, and from this order James W. Stevens has prosecuted this appeal.

It thus appears, from the facts stated, that the determination of the question presented by this record depends upon the proper interpretation of the two agreements heretofore mentioned. Do they, or either of them impose upon Clarke an obligation to pay to Stevens one-half of the cost incurred by the firm of Clarke & Stevens in placing them upon the leased premises? If he is not liable under the agreements, it is conceded that the decree appealed against must be af-

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firmed, as it is under those agreements alone that the appellee seeks to fasten liability upon him. It is not pretended that he can be held liable on any other ground. In *Milske v. The Steiner Mantel Company*, 103 Md. 235, we said: "It is needless to quote authorities to show that in the construction of a contract the intention of the parties as it appears from the whole agreement must be ascertained and given its full effect. The rule of construction was stated, with great clearness, in *Nash v. Towne*, 5 Wallace, 699, as follows: "Courts, in the construction of contracts, look to the language employed, the subject matter and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and, in that view, they are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described."

We will now look to the circumstances under which these agreements were made, as they will, we think, make clear their meaning and effect. On the 31st of October, 1903. Elizabeth V. Gerke *et al.* leased to James W. Stevens and James F. Clarke, co-partners, trading as Clarke & Stevens the lot of ground and premises known as No. 5 West Lexington street in the city of Baltimore for a period of ten years, with the privilege of the extension of the term of the lease for a further period of four years, at the yearly rent of six thousand dollars. Among the stipulations of the lease was one which imposed upon the lessees the duty of making certain repairs and alterations in the building. The nature and character of these repairs and alterations were specifically described in specifications accompanying the lease; but under the terms of the lease there was no obligation imposed upon the lessees to make repairs to the side walls of the building. Before the beginning of the term provided for in the lease, the Inspector of Buildings of Baltimore City condemned the walls of the building as unsafe, and directed that they

be made secure or removed. A question arose between the landlords and the tenants as to whose duty it was to rebuild or repair the dangerous walls. Each claimed it to be the duty of the other. The lessees filed a bill in equity to enforce the lease and asking that the lessors be required to pay the cost of rebuilding the defective walls. On the 18th of April, 1904, after the defendants had answered the bill, an agreement was filed in which it was agreed by all the parties that the lessees should enter upon the premises without the hindrance of any of the parties to the cause and without prejudice to the rights of any of the parties thereto; that the lessees on their part and the lessors on their part should keep memoranda of their several claims under the agreement and lease and account with each other, and in case of a disagreement between them as to any account, or the rendering or settlement thereof, each party might apply to the Court in the cause to state a proper account thereof in due course. Upon the bill and exhibits, answer and agreement the Circuit Court for Baltimore City on the 18th of April, 1904, passed an order assuming jurisdiction of the case and retaining the bill for the purpose of carrying out the agreement, and authorized and directed the lessee to take possession of the premises No. 5 West Lexington street under the terms of the agreement filed in the cause.

On the 1st of February, 1905, the lessees filed a petition in the cause in which, among other things, they claimed an allowance for the expenses incurred by them in tearing down, rebuilding and restoring the part of the leased premises which the inspector of buildings had condemned. These expenses amounted to six thousand seven hundred and fifty dollars and forty-six cents, and included the item of seven hundred and sixty-one dollars and seventy-five cents for fire shutters in question in this case. The lower Court decided that the lessors were not liable for these expenses; but this Court upon the appeal held they were liable for the whole amount claimed, except for the item of fire shutters. This item was refused because the testimony showed that these shutters

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"were not required by the building regulations; but, as expressed in the testimony, were supplied as "a matter of insurance."

JUDGE JONES in *Clarke & Stevens v. Gerke et al.*, *supra*, said, that at the time the decree appealed from in that case was passed "the only question the Court was called upon to decide was whether the obligation to assume the cost of and payment for the removal and rebuilding of that portion of the building on the leased premises which was condemned and ordered removed by the inspector of buildings devolved upon the appellants or the appellees."

It was while this question was pending in the lower Court, and while the result of the litigation was involved in doubt and uncertainty that the partnership was dissolved, and Clarke in consideration of six thousand seven hundred and fifty dollars paid to Stevens acquired all his interest of every kind in the partnership property, including all his interest in the lease upon the Lexington street premises; subject, however, to the two limitations or conditions specified in clause five of the agreement of dissolution. These were first, that Clarke & Stevens should be equally responsible for any claim which might be recovered by Elizabeth V. Gerke *et al.* against them; second, that they should divide whatever sum might be recovered in that suit against Elizabeth V. Gerke *et al.* No claim was established against the firm in that suit, as this Court held that the fire shutters were placed upon the building not in consequence of the condemnation of the building, but voluntarily by the partners "as a matter of insurance." Therefore, the appellee is not liable under the agreement to the appellant for the claim he seeks to recover, because the contingency upon which such a liability depended never happened. The amount recovered by the partners against the appellees in that suit has been equally divided between the partners as provided for in the agreement. It, therefore, seems to be clear that whatever interest the appellant had, as a member of the firm of Clarke & Stevens, in these fire shutters he sold and transferred to Clarke under the

agreement and by the deed of September 30, 1905. There is nothing in the paper filed in the case of *Clarke & Stevens v. Gerke, supra*, entitled "plaintiff's agreement" and which appears also in this record, and which we have transcribed in an earlier part of this opinion, in conflict with the agreement of dissolution. It was not intended by the parties to alter or vary that agreement, and it is, therefore, in harmony with the construction which we have placed upon the fifth clause of the agreement for the dissolution of the partnership. It follows that the order appealed from must be affirmed.

Order affirmed, with costs.

LESLIE GEORGE TAYLOR vs. HELEN J. TAYLOR

Divorce—Intention to Abandon—Evidence.

In order to constitute a ground of divorce for abandonment, the intention of the one party to abandon the other need not have been formed at the time the actual separation occurred. If after the separation took place, that party entertains the purpose to desert the other, and the separation and the intention continue for the period fixed by statute, that is an abandonment within the meaning of law, and authorizes a divorce for that matrimonial offense.

Upon a bill for divorce by a husband against his wife, the evidence examined and held to show that the defendant voluntarily left her husband's house and returned to her father; that thereafter she refused the requests of her husband to return to his home; that there was no just cause for her refusal; that either at the time of leaving her husband or soon afterwards she formed the intention not to return to him; that this desertion has continued uninterruptedly for more than three years, and is without reasonable expectation of

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reconciliation, and that consequently the plaintiff is entitled to a decree of divorce.

Decided March 31st, 1910.

Appeal from the Circuit Court for Cecil County (HOPPER, J.).

The cause was submitted to the Court on briefs by:

Bernard Carter, for the appellant.

George A. Blake, for the appellee.

PATTISON, J., delivered the opinion of the Court.

This is an appeal from an order of the Circuit Court for Cecil County dismissing the plaintiff's (appellant's) bill asking for a divorce *a vinculo matrimonii* from the defendant upon the ground of abandonment of him by her.

The bill filed in this case, August 28th, 1908, alleges that the plaintiff, Leslie George Taylor, on the 25th day of June, 1902, was married to the defendant, Helen G. Taylor, at Perryville, in Cecil County, Maryland; that both, since their marriage, have resided continuously in said county, and that they lived together at Perryville from the time of their marriage until the fourth day of November, 1903, when upon said last named day the defendant abandoned her husband, and that said abandonment continued uninterruptedly from that time to the time of the filing of the bill in this case, a period of more than three years; that the abandonment is deliberate and final and the separation beyond any reasonable expectation of reconciliation. The plaintiff, in the bill, further alleges that he is advised that by reason of such long continued abandonment of him by the defendant he is entitled to a divorce *a vinculo matrimonii* from her.

The defendant answered the bill, admitting all of its allegations except the one of abandonment and the averment that the plaintiff is entitled to the divorce asked for.

In support of the allegations of his bill, the plaintiff offered the testimony of himself, his mother, Lydia A. Taylor, and Mrs. E. K. McLain, and filed with the examiner a certified copy of the record of a former case in this Court between the same parties, reported in 108 Md. 129, together with certified copies of the opinion of this Court in that case and in its decree passed in accordance therewith, which are to be taken and read as evidence in this case. No other testimony was offered, and upon the submission of the case to the lower Court, Judge Hopper dismissed the bill with costs to the defendant. It is from that order that this appeal is taken.

On July 13th, 1904, Helen G. Taylor, the defendant in this case, filed in the Circuit Court for Cecil County, a bill against her husband, the plaintiff in this case, asking for a decree requiring him to pay unto her permanent alimony upon the ground therein set forth.

The defendant answered the bill, denying the important allegations contained therein, and a large amount of testimony was taken by both the plaintiff and defendant upon the issues joined. Upon the submission of the case to the Circuit Court for Cecil County, for its determination, a decree was passed by it, requiring the defendant, Leslie George Taylor, to pay unto his wife, as alimony, the sum of one hundred and eighty dollars *per annum*. This Court, upon appeal from that decree, reversed the lower Court and passed a decree dismissing the bill of the plaintiff with costs to the defendant. *Taylor v. Taylor, supra*.

The only witness in this case not in the former case is Mrs. E. K. McLain, who testified that she was in the office of the plaintiff, Dr. Taylor, on November 4th, 1903, the occasion on which his wife left her home, and saw her leave the house in the afternoon of that day, and heard Dr. Taylor say to her, "Helen, I don't want you to go."

The testimony of the plaintiff and his mother was again taken, but they testified to no material facts that were not given by them in their testimony in the former case. Therefore, the testimony, is practically the same in both cases, at

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least, this additional testimony added nothing to the evidence in the former case favorable to the defense in this case.

In the former case the plaintiff, Helen G. Taylor, contended that the acts and conduct of the defendant, Dr. Taylor, in his treatment of her, amounted to an abandonment of her by him. The Court in that case, speaking through JUDGE SCHMUCKER, said: "It is not averred in the bill that he, himself, left the marital domicile and refused to return to it. The abandonment is alleged to have been accomplished through deceit on his part, by inducing her to visit her parents and then refusing to permit her to return to his home. The Court then, after reviewing the evidence in the case, said: "We do not think the charge of abandonment, made by the plaintiff against the husband, is supported by the evidence." In that case the husband was charged by the wife with abandonment of her; in this case the wife is charged by the husband with abandonment of him, and the counter charges are each based upon practically the same state of facts. Upon these facts, the Court has said in the former case, the charge against the husband was not sustained; and now, upon this appeal, we are called upon to pass on the charge of abandonment made by the husband against the wife, which is the only question presented by this appeal. In the case of *Gill v. Gill*, 93 Md. 654, after stating the definition of abandonment or desertion, as defined in the cases of *Lynch v. Lynch*, 33 Md. 328, *Gregory v. Pierce*, 4 Metcalf, 479, and *Bennett v. Bennett*, 43 Conn. 313, this Court referring to what was said in those cases, speaking through JUDGE PEARCE, said, that these judicial declarations as to what constitutes abandonment or desertion, in law, agree with the definition of the leading textwriter of this country upon this subject, Mr. Bishop, who says in his work on *Marriage, Divorce and Separation*, Vol. 1, secs. 1662, 1663: "Desertion as a matrimonial offense, is the voluntary separation of one of the married parties from the other or the voluntary refusal to renew a suspended cohabitation, without justification either in the consent, or the wrongful con-

duct, of the other. Its (inherent) affirmative elements are two—the cohabitation ended—and the offending party's intent to desert. The statute creates a third affirmative element, the lapse of a defined period of time. In all cases the criterion is the intent to abandon. 1st *Bishop*, sec. 1672; *Stewart on Marriage and Divorce*, secs. 254, 255; *Alkire v. Alkire*, 33 W. Va. 517.

It is disclosed by the evidence in this case, that the wife after living with her husband from the date of their marriage June 25th, 1902, to the 4th day of November, 1903, on the last named day left her husband and home in Perryville and went to the home of her father, in Cecil County, about one and one-half miles therefrom, and that she has not since returned to her husband and home, but during this interval of the time has continuously lived separately and apart from him. It is, however, contended by her that when she left to go to her father's, it was her intention to return in a few days thereafter; that, at the time, she was suffering from the result of an operation performed upon her foot, made necessary by an ingrowing nail, and that her visit there was for the purpose of resting her foot, which she could not do at her own home, on account of the household work that devolved upon her when there. She also claimed that her visit to her father's home was first suggested by her husband, but before the time came for her to leave her home, some domestic controversy arose between her and her husband, in which his mother also became involved, resulting in Dr. Taylor withdrawing his consent to her leaving her home at that time, and, as she says, he told her, "The horse is ready, but remember, if you go out of this house today, you will never come back in it," and when asked by her what he meant by this remark, he said: "I mean just what I say, if you go out of this house today you will never come back in it."

This version of her leaving is borne out by the testimony of both her husband and his mother, except they both say that he did not tell his wife that if she went to her father's she could not return. Notwithstanding this interposition on the

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part of the husband the wife left and went to her father's, and has never returned to her home, and has since that time continuously resided separately and apart from him.

This Court, in the former case, speaking of the alleged justification of the wife in leaving her home and in living apart from her husband, said: "These occasional outbreaks in the harmony of the marital life of the parties to this suit, even though they be chargeable to the husband's conduct, do not, in our opinion, exhibit such cruelty or ill-treatment by him of his wife, as to justify them living apart from each other."

This separation of the wife and husband, caused by the wife leaving her home and living separately and apart from her husband, without justification, as the Court has said, establishes the existence of one of the affirmative elements of the alleged abandonment of her husband by her, that of *cohabitation ended*.

We will next consider the evidence in respect to the second element of abandonment, to wit, the *intention to desert*, and determine, if we can, whether or not this element was at the time of her leaving home, or at any time thereafter, during the separation, added to the element of *cohabitation ended*.

"Separation, and intention to abandon, must concur in order to constitute cause of divorce on ground of abandonment; but they need not *be identical in their commencement*." *Pinkard v. Pinkard*, 14 Tex. R. 357.

"Although to constitute desertion, there must be a simultaneous separation and an intent to desert, and desertion does not exist without the presence of both, the two need not begin together, but the desertion begins whenever to either one the other is added." *Bishop on Marriage, etc.*, Vol. 1, sec. 1696. And when such abandonment, with the two elements existing, has continued uninterruptedly for a period of time fixed or defined by the statute, the third essential element is added thereto, and the abandonment as a matrimonial offense thereby becomes complete.

We are told by the defendant that when she left her home on the fourth day of November, 1903, she intended to return thereto after paying a visit of a few days to her father's home, and this she told a neighbor upon bidding her good-bye on that occasion. It may have been, or it may not have been, her intention at the time she left home to return to it and resume her marital relations with her husband, but if so, do not her subsequent acts and conduct, as disclosed by the evidence, show that such an intention to desert her husband was formed thereafter, while she was living separately and apart from her husband?

On December 3rd, 1903, within one month from the time that the defendant left her home and while she was still at her father's the plaintiff wrote and sent to her, by special messenger, a letter which was delivered to her in person. The letter was as follows:

"My Dear Wife:

Your home is with me and I want you to come back and make it home-like. Let the past be forgotten and start over again. I see no reason why we can't live happily together and make confidants of each other. I am willing to do my part if you are yours. I feel satisfied if we can have a talk alone matters can be adjusted. You know I begged you not to leave and have been sorry ever since that you did.

Helen, come back, forgive me if I have been hasty, as I will you, and we will stand by each other and this experience perhaps may do us good and we will fight life's battles once more hand in hand.

Yours with much love,

GEORGE.

PERRYVILLE, December 3d."

Some weeks after the receipt of this letter and while it was still unanswered, the plaintiff and defendant met, by accident, in the town of Perryville and a conversation between them followed, which is fully set out in the opinion of this

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Court in the former case. In this interview the defendant was asked by the plaintiff if she had received the letter written and sent by him to her, to which she replied that she had, and suggested to the plaintiff that he get in the carriage in which she was riding, and go with her to her mother's saying that she felt sure they could there adjust their differences. This he declined to do, saying that her mother had told him he should never darken her doors again, and suggested that they go to their own home in Perryville and talk their matters over there, but she refused. She then suggested that they go to her lawyer's office; this was not agreeable to the defendant. In this conversation the defendant admitted that her husband asked her to come back and live with him, and she replied by saying, "upon condition," and when asked what that condition was, she said she did not want to live with his mother, but did not say she would not. The defendant never replied to the letter sent to her by her husband, nor did she ever return to her home and resume her marital relations with her husband.

After the interview referred to above, no other overtures looking towards a reconciliation were ever made by either party, but some months thereafter the bill in the former case was filed by the defendant, asking that her husband be required to pay her alimony, which, under the decree of this Court, was refused her.

In the former case, referring to the letter sent by the husband to the defendant and their interview in Perryville hereinbefore mentioned, in both of which, that is, in the letter and in the interview, the defendant was asked to return to her home and resume her marital relations with her husband, this Court said: "This letter, in view of the transactions which preceded it and the method of its delivery, may be regarded as suspiciously fervid in tone and as protesting too much, but it contains a definite proposition for mutual forgiveness and reconciliation, and a positive request to the wife for a full restoration of conjugal relations, and it should have received a reply from her. Even according to her own

version of their parting, she left his house deliberately after being warned that if she did so she could not return, while according to his account she went against his wish and request although she had his permission to go. Even if she doubted the sincerity of his letter of December 3rd, 1903, it contained so plain a request to forget the past and start afresh their living together that it was her duty at least to test his sincerity by a favorable response to his request. She should have yielded a ready assent to his subsequent offer to go with her to his home and talk over their affairs with a view to a reconciliation.

"If the parties separated by mutual consent, and one of them afterwards, in good faith, seeks a reconciliation but the other refuses to return; or, if (the separation was) for cause, and the cause is removed, but one of them declines to *renew the cohabitation* this is desertion by the one refusing, from the time of refusal." *Bishop on Marriage, etc.*, Vol. 1, sec. 1707.

"Any refusal or neglect to cohabit as husband and wife for the statutory period will constitute desertion, unless the absent party has reasonable cause for his absence. Where the parties have separated by consent or for some cause not sufficient to constitute a cause for divorce, the party refusing to resume cohabitation is guilty of desertion." *Amer. & Eng. Enc.*, Vol. 9, 2nd edition, 768.

"Where the parties are separated without reasonable cause neither can complain of the absence of the other as desertion, unless one party has made an offer of reconciliation or sought a reunion. If the offer is refused under such circumstances, the party refusing is guilty of desertion, unless the offer is refused because the party making the offer has been guilty of cruelty or some other cause for divorce. In order to have this effect, however, the offer must be made in good faith and for the purpose of effecting a reconciliation." *Amer. & Eng. Enc.*, 2nd edition, Vol. 9, 773.

We do not feel called upon in this case to determine the *bona fides* of the offers of reconciliation made by the plain-

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tiff to the defendant in his letter of December 3rd, 1903, and in the interview in Perryville some weeks thereafter, as we regard what was said by this Court in the former case in stating the legal effect of such offers, making it incumbent upon the defendant to respond thereto, as determining this question.

In our opinion, the intention on the part of the wife to desert the husband has been added to the element of cohabitation ended. That if such intention did not exist at the time that she left her home and separated from her husband, that it thereafter had its origin and existed at and after the time of her refusal to respond to the offers of reconciliation embraced in the letter to her of December 3rd, and the interview with her some weeks thereafter, not later than Christmas of 1903, as by the evidence it is disclosed that her visit to Perryville, on that occasion, was to carry her sister who was then practicing for the Christmas music, and therefore could not have been later than Christmas of 1903. And as this bill was not filed until August 28th, 1908, this separation, embracing these two elements of abandonment, existed uninterruptedly for the full period fixed and defined by the statute, making the abandonment of him by her, as a matrimonial offense, complete.

From what we have said, it follows that the learned Court below erred in dismissing the bill of the plaintiff.

The decree of the Circuit Court is reversed with costs to the appellant above and below, and the cause remanded that a decree *a vinculo matrimonii* may be passed in conformity with this opinion.

Decree reversed and cause remanded.

PEARCE and BURKE, JJ., dissent.

JOHN BAKHAUS vs. THE CALEDONIAN INSURANCE COMPANY.

Fire Insurance—Waiver of Proof of Loss—Evidence—Loss Payable to Insured as Interest May Appear—Waiver of Condition as to Sole Ownership—Pleading—Consolidation of Actions—Permission to Complete Building a Waiver of Condition as to Vacancy.

The provisions in a policy of fire insurance restricting the power of agents to waive the conditions have reference to conditions that form a part of the contract, and do not refer to stipulations to be performed after a loss has occurred.

When statements made by an insurer to the insured after a loss induced the latter to believe that the formal proofs of loss mentioned in the policy would not be required of him, and acting upon that belief, he refrained from filing proofs of loss within the time limited by the policy for so doing, these circumstances constitute a waiver by the insurer of the formal proofs.

Two days after a fire had destroyed certain buildings covered by policies of insurance, an agent of the insurer and its adjuster visited the premises, questioned the insured concerning the property and its destruction, at a subsequent interview further discussed the matter and directed the insured to make a statement under oath to the Fire Marshal, and then told the insured that he would hear from the adjuster. *Held*, that these facts are legally sufficient evidence to show that the conduct of the agent of the insurer induced the insured to believe that proofs of loss would not be required, and that the company would either settle the loss or deny all liability.

Evidence that according to the general custom the insurance adjuster furnishes the insured with blank proofs of loss unless he determines not to pay the same, is admissible in connection with other evidence as to the conduct of the insurer which induced the insured to believe that proofs of loss would not be required.

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Syllabus.

A policy of fire insurance was issued to A. alone, but it contained a rider or addition saying, "loss if any payable to the assured as interest may appear." The policy provided that it would be void, unless otherwise provided by agreement endorsed thereon, if the interest of the insured be other than unconditional and sole ownership, or if the interest of the insured be not truly stated. The property insured belonged to A. and his wife as tenants by the entireties, and there was a mortgage on it. *Held*, that the effect of making the loss payable to the insured as his interest may appear was to waive the conditions of the policy requiring the insured to be the sole owner and that his interest should be as stated.

When a demurrer to a plea or replication is sustained, but the pleader gets the full benefit of his defense or reply by an amended plea or replication, he is not prejudiced by the ruling on the demurrer, even if the Court erred.

When two different policies of fire insurance are issued by the same company on adjoining properties destroyed by the same fire, and two actions are brought on the policies, the Court may order the cases to be consolidated by virtue of Code. Art. 50, sec. 8.

In an action on a policy of fire insurance, the plaintiff cannot be asked if he knew that formal proofs of loss were necessary.

Evidence that the plaintiff had knowledge, before consulting counsel, that the insurance company would refuse to pay his claim is immaterial.

At the time a policy of fire insurance on certain houses was issued, the buildings were not finished. That fact was then known to the agent of the insurer, and they were burned before completion. The policy contained a provision that it should be void if the building insured be or become vacant or unoccupied and so remain for ten days. Endorsed on the policy was permission to make alterations, additions and completions. *Held*, that the effect of this permission to complete the buildings was to waive the provision of the policy requiring the houses to be occupied and that condition would not apply until the houses were ready for occupancy.

Decided March 31st, 1910.

Appeal from the Baltimore City Court (HARLAN, C. J.).

The cause was argued before BOYD, C. J., BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON and URNER, JJ.

S. S. Field (with whom were *Wm. F. Pirscher* and *Gill & Preston* on the brief), for the appellant.

W. Calvin Chesnut and *J. Morfit Mullen* (with whom were *Gans & Haman* on the brief), for the appellee.

THOMAS, J., delivered the opinion of the Court.

In 1901, John Bakhaus, the appellant, and his wife, who for fifteen years, and practically ever since they came to America, had been engaged in keeping a stall in Cross Street Market, in Baltimore City, where they sold smoked fish, eels and "German Produce," purchased for \$575.00, an unimproved lot in Brooklyn, Anne Arundel County, near Baltimore, containing about three acres of land, on which, a year later, they gave a mortgage for \$350.00. In 1904 they erected on a portion of this lot, on the corner of Sixth street and Stools road, a dwelling house, said to be worth \$1,500 or \$1,600, in which they resided with their children at the time of the fire hereinafter referred to. In April, 1907, they began the erection of six other dwelling houses on said lot, the nearest of them being about thirty feet from their dwelling. They were not built by contract, but the appellant and his wife purchased the materials and employed the carpenters and other mechanics, the appellant and his son, who was seventeen years of age, assisting in the work. The condition of these houses, which were unoccupied and, with their dwelling were destroyed by fire on January 19th, 1908, is described in the record as follows: "The six houses were all under roof, three were plastered and painted and ready for occupancy, except that the porches were not built and yards were not fenced; lumber for porches and fences was there; and three

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were lathed but not plastered or painted on the inside; all six were painted on the outside; the doors were all on or fitted and standing in the houses and were burnt; the shutters were in the dwelling and were saved; the houses were two stories and basement containing four rooms, basement kitchen and cellar, or counting the cellar, six rooms in all; these houses were all frame; the nearest of them was about thirty feet from his dwelling; none of the porches had been put up and the lumber which was intended for the porches was piled between the six houses and the dwelling and was removed by them at the time of the fire and not burnt."

At the time of the fire there were two policies of fire insurance on the dwelling in which the appellant and his family resided, one issued by the German Insurance Company to the appellant and his wife, for \$500.00 on the dwelling, and \$350.00 on their furniture, and the other by the Caledonian Insurance Company, May 3rd, 1905, for three years, in favor of the appellant for \$500.00; and there were also two policies on the six dwelling houses, one for \$3,000.00 to the appellant and his wife, issued by the Germania Fire Insurance Company, and the other issued by the Caledonian Insurance Company, November 27th, 1907, in favor of the appellant, for \$1,200.00 or \$200.00 on each house. The German Insurance Company settled with the appellant and his wife the loss occasioned by said fire, but the Caledonian Insurance Company, through Thomas E. Bond, its adjuster, notified the appellant by letter, dated April 6th, 1908, that it denied liability under its said policies, and on the 9th of May the appellant brought two suits against the appellee, one on the \$500.00 policy and the other on the \$1,200.00 policy.

These policies contain the usual clauses found in the New York Standard Fire Insurance Policies, requiring the insured to give written notice of a loss; to furnish, within sixty days after the fire, unless the time is extended in writing by the company, proofs of loss, and providing that the amount of loss, as ascertained in accordance with the terms of the policy, shall be payable sixty days after satisfactory

proofs of loss, etc., have been received by the company. They also contain the following conditions:

"This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss..

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void * * * if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee-simple; * * * or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

"No suit or action on this policy, for the recovery of any claim, shall be sustainable in any Court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

There was also added to the policies the following warranty: "Warranted by the assured that this dwelling shall be occupied by a family during the life of this policy, which shall not be construed as meaning the occupancy of an apartment or apartments by a man or men, and which, however, shall not prejudice assured's right to the ten (10) days' vacancy permitted by the conditions of this policy."

In the first case the defendant pleaded "never promised as alleged" and that it "never was indebted as alleged," and, relying upon the above provisions of the policy, set up the further defenses: first, that the plaintiff did not furnish the proofs of loss as required by the policy; second, that the interest of the insured in the property was not truly stated in the policy, the policy having been made to the plaintiff

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alone, whereas the property belonged to the plaintiff and his wife as tenants by the entireties; third, that the plaintiff was not the unconditional and sole owner of the property, as required by the policy, and that said provision of the policy had not been modified by any agreement added to or endorsed thereon; and, fourth, that at the time of the execution of the policy, and at the time of the fire, there was a mortgage on the property for \$350.00, which fact was concealed by the plaintiff and was not stated in the policy, and that, therefore, the interest of the insured in the property was not truly stated in the policy. In the second case, in addition to the pleas relied on in the first case, the defendant further alleged: first, that the buildings remained vacant and unoccupied for more than ten days, and had never been occupied by families as required by the policy; second, that the plaintiff, at the time of the execution of said policy, represented that the houses were occupied by tenants, whereas said houses were not so occupied; and, third, that at the time of the execution of said policy the plaintiff represented to the defendant that there was \$300.00 insurance on each of the houses, whereas there was \$500.00 insurance on each of the houses, and that said representations were as to material facts, were relied on by the defendant and were fraudulently made. Issues were joined on the first and second pleas, and to the other pleas the plaintiff replied: first, that the defendant waived the furnishing of proofs of loss; second, that there were attached to said policies riders containing the following provision: "Loss if any payable to the assured as interest may appear," and that he did not conceal the existence of said mortgage or make any misrepresentation concerning the same; third, that the houses covered by the policy for \$1,200.00 "were in course of construction at the time the policy was issued; that the defendant's agent saw them and knew it,—that the fire occurred before they were completed and ready for occupancy, and the policy contained the following endorsement: 'Permission to make alterations, additions, completions and repairs and this policy to cover materials on premises for mak-

ing same;'" fourth, that he did not represent to the defendant at the time of the issuing of the policy that the houses therein mentioned were occupied by tenants, and that the agent of the defendant knew that the houses were not occupied and were not completed or ready for occupancy; and, fifth, that he did not represent to the defendant at the time the policy was issued that there was \$300.00 insurance on each of the houses, and that he told the defendant's agent that there was \$500.00 insurance on each house.

There are numerous pleas, replications and rejoinders, occupying a large part of the record, but the above statement of the pleadings is sufficient to indicate the defenses relied on by the defendant, the contentions of the parties, and the more important questions to be determined on this appeal.

The record contains five exceptions, the first is to the order of the Court consolidating the two cases, the second, third and fourth to rulings on the evidence, and the fifth to the granting of the defendant's second prayer. At the conclusion of the testimony produced by the plaintiff the defendant offered the following prayers:

1. At the request of the defendant, the Court instructs the jury that under the pleadings in this case, there is no evidence legally sufficient to entitle the plaintiff to recover, and the verdict must, therefore, be for the defendant.

2. At the request of the defendant, the Court instructs the jury that by the uncontradicted evidence in this case, the plaintiff did not furnish to the defendant the proofs of loss required to be rendered by the plaintiff to the defendant under each policy sued on, and there being no evidence in this case legally sufficient to show any waiver by the defendant of this requirement of the policies, the verdict of the jury must be for the defendant.

3. At the request of the defendant, the Court instructs the jury that with respect to the \$1,200.00 policy offered in evidence, the same contained a warranty that the insured premises should be occupied by a family during the life of the policy (except that ten days vacancy was permitted), and

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that by the uncontradicted evidence the insured property was not occupied by a family for a period of more than ten days preceding the fire; and that there is no evidence in this case legally sufficient to show any waiver by the defendant of this warranty, and that, therefore, there is no evidence in this case legally sufficient to entitle the plaintiff to recover against this defendant on said \$1,200 policy.

4. The defendant prays the Court to instruct the jury that under the pleadings there is no evidence in this case legally sufficient to show any value of the plaintiff's interest in the property destroyed by fire, and for the damage to which this suit is brought, and that therefore, the jury can award the plaintiff only nominal damages.

The Court rejected the first, third and fourth prayers but granted the second prayer, instructing the jury that there was no evidence legally sufficient to show a waiver by the defendant of the provision of the policies requiring the plaintiff to furnish proofs of loss. The verdict and judgment were accordingly in favor of the defendant, and from that judgment this appeal was taken.

The first important question to be considered relates to the granting of that instruction. It is conceded that the plaintiff did not furnish proofs of loss, and that, under the terms of the policies, unless there was evidence of a waiver of the provisions requiring him to do so, there was no error in the Court's ruling.

It is said in 13 *Am. & Eng. Ency. of Law*, 345 (2nd ed.), that: "A great variety of acts and circumstances have been held to constitute waiver of the terms and conditions of policies as to proofs of loss, but these may be brought together under three general heads, namely: First, acts, conduct or statements of the insurer or those representing it by which the insured is induced not to make proofs or to believe that they are not required or will not be insisted on; second, acts or conduct of the insurer or its representatives recognizing its liability and showing an intention not to require proofs or to dispense with them; third, acts or conduct making it

apparent that the furnishing of proofs would be an unnecessary formality and nugatory." It is also said that the waiver may be "by a general agent, and adjuster or special agent of the insurer for adjusting the loss or like losses, or another agent of the insurer acting within the apparent scope of his authority." 13 *Am. & Eng. Ency. of Law*, 350 (2 ed.); 19 *Cyc.* 859-860. In the case of *Rokes v. Amazon Insurance Co.*, 51 Md. 512, this Court held that proofs of loss are required for the benefit of and may be waived by the insurer, and that it is not "necessary to prove an express agreement to waive," but that "it may be inferred from the acts and conduct of the insurer inconsistent with an intention to insist upon the strict performance of the condition." JUDGE PAGE, in *Hartford F. Ins. Co. v. Keating*, 86 Md. 149, referring to the provisions in a policy requiring proofs of loss to be furnished within sixty days, says, "all authorities agree that the condition may be waived, either expressly or by acts and conduct of the insurer himself, or of his agent, having real or apparent authority; and the waiver may be inferred from such acts and conduct as are inconsistent with an intention to insist upon a strict performance." In the case of *Continental Ins. Co. v. Reynolds*, 107 Md. 96, JUDGE BURKE, dealing with a provision in the policy making the loss payable sixty days after the furnishing of satisfactory proofs of loss, after stating that the provision was inserted for the benefit of the company, and that it may waive the provision or deny liability under the policy, in either of which events, the insured may bring suit without waiting for the expiration of the time limit, says: "But whether there has been a waiver, an estoppel, or a repudiation of liability under the contract, is a question to be ascertained from the conduct of the insurer and from all the facts and circumstances of the case. * * * And where the evidence tends to show that the company had definitely determined not to pay the loss, or had waived the provision under consideration, or was estopped by its conduct to insist upon it, it would be error to declare as a matter of law that the suit was premature." And it had

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been repeatedly held in this State that provisions in policies limiting and restricting the power of agents to waive the conditions and provisions of the policy have reference to conditions and provisions that enter into and form a part of the contract, and which are essential to make it a binding contract, and do not refer to stipulations to be performed after a loss has occurred. *Franklin F. Ins. Co. v. Chicago Ice Co.*, 36 Md. 102; *Rokes v. Amazon Ins. Co.*, *supra*; *Farmers' F. Ins. Co. v. Baker*, 94 Md. 545; 19 Cyc. 360.

It is not necessary to refer to the many cases in this State and elsewhere for illustrations of the application of the doctrine. The rule is well settled, and the question of waiver in any case must depend upon the facts and circumstances of that case. The provisions relating to proofs of loss are, as has been stated, inserted in the policy for the exclusive benefit of the insurer, in order that it may be informed of the nature, character and extent of the loss, and while the insurer may stand on its contract and exact compliance with its terms, there is no reason why these provisions may not be waived by it. The business in which insurance companies are engaged is one in which the security and protection of the insured are largely entrusted to the honesty and fairness of the insurer, and this Court has frequently said that good faith demands of them "frank and open dealing with their policy holders." Any acts or conduct of the insurer, or its representative, that are, under the circumstances, calculated to mislead the insured and to induce him to believe that performance of the condition will not be required, or that proofs of loss would be ineffectual and nugatory, will, if he is thereby misled, amount to a waiver.

Turning to the facts in the case, we find, in addition to what has already been stated, that the fire which caused the loss sought to be recovered in this case, was first discovered by the appellant and his wife while on their way home from Cross Street Market, between twelve and one o'clock Saturday night, January 18th, 1908. The houses and their contents, except the foundations and the furniture, etc., on the

first floor of appellant's dwelling, were completely destroyed. The appellant sent his son to notify the insurance companies, and on the second day after the fire Doctor Brooks, the agent of the appellee from whom the policies in this case were obtained, Mr. Bond, the adjuster for the appellee and the Germania Fire Insurance Company, and Mr. Deming, the adjuster for the German Insurance Company, went to the scene of the fire and asked for the appellant but he was not at home. They measured the foundations of the houses and questioned the appellant's son. Mr. Bond asked him where he was at the time of the fire, "how near the houses were finished," and if the shutters were on the houses. After talking to some of the people in the neighborhood, they told the appellant's son to tell his father to come to Mr. Deming's office the next day. On his way home from Baltimore the appellant met Mr. Bond, Dr. Brooks and Mr. Deming returning to Baltimore, and Mr. Bond and Mr. Deming told him to meet them at Mr. Deming's office the next day. He accordingly went to Mr. Deming's office and there met Mr. Deming, Mr. Bond and Mr. Deming's son. In reply to the question "what took place there," the appellant said: "They asked me how I discovered the fire, and I told them all about it, that I came from town with my wife, and they asked me how far the houses were finished and I told them and how much those houses would cost to finish them and all those questions that Mr. Bond asked me. He asked me who made the concrete foundations, and I told him I did, with two or three men to help me, and he told me I had made a good job of it. And then Mr. Deming told me that I should make a list of the furniture, Mr. Bond told me as he went out, he said, 'You will hear from me.'" The appellant further testified that neither Mr. Bond nor Mr. Deming said anything to him "about making up written proofs about the houses." When asked, "When was the next time you saw Mr. Bond," appellant replied: "It was about eight days afterwards. Me and my wife went to the German Fire Insurance Company and from there they told us we should go to Mr. Deming.

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As we came into Mr. Deming's office Mr. Bond was in there but Mr. Bond did not give me any chance to talk with him. Once he saw me and my wife and went out of the door." He stated that the next time he saw Mr. Bond was at the Fire Marshal's office, and when asked how he happened to be in the Fire Marshal's office, he said: "The Deputy Fire Marshal came up there and he ordered me down to his office and I made a statement to him and one day I went to the mail and there was a letter there to John Backhaus from the State Fire Marshal to come up to his office. As I came up there they found out they had the wrong man, that letter was intended for my son, and as I was sitting there Mr. Deming he came and Mr. Bond came out and asked me a lot of questions about the fire, asked how far the houses were finished, and the State Fire Marshal he ordered me out of the door and he says, step out a minute. Mr. Deming went out before that. Then the Fire Marshal came and he said, you can tell your son to come up tomorrow morning about 11 o'clock, and I said alright. But I did not go away, I waited in the corridor and wanted to talk with Mr. Bond. Mr. Bond came out and I asked Mr. Bond, I said: 'What are you going to do about my insurance' and he told me again, he said: 'I cannot do a thing, you will hear from me, I cannot do a thing.'" Appellant stated further that Mr. Bond asked him in the Fire Marshal's office if he knew about the shavings and a barrel; "how it was the doors and shutters were in his dwelling;" if he had left the barrel in one of the houses with shavings in it, and if he had refused to let people in the stables to take the horse out, and that after this conversation with Mr. Bond, he waited to hear from him, and "about fourteen days after I waited and waited and didn't hear anything from Mr. Bond or from anybody, I went up to the German Fire Insurance Company again, and the German Fire Insurance Company sent me to Mr. Deming and Mr. Deming, he was not ready for me then, and I went into Mr. Bond right in Mr. Bond's office. While I came in there Mr. Bond was sitting on the telephone and I asked him again and he says,

I have just been telephoning to Mr. Deming and I am going to see Mr. Deming tomorrow and we will let you know." The appellant did not hear anything further from Mr. Bond until he received the following letters:

"BALTIMORE, April 6th, 1908.

MR. JOHN BACKHAUS,
Baltimore Maryland.

Dear Sir:

The Caledonian Insurance Company instructs me that it admits no liability under its policy No. 1776827, and hereby tenders you the return of the full amount of premium paid thereon, being the sum of Twelve 00/100 Dollars, which find enclosed.

Please receipt for same on this letter and return to me.

Yours truly,

THOMAS E. BOND,
Adjuster Caledonian Insurance Company."

"BALTIMORE, April 6th, 1908.

MR. JOHN BACKHAUS,
Baltimore Maryland.

Dear Sir:

The Caledonian Insurance Company instructs me that it admits no liability under its policy No. 1643483, and hereby tenders you the return of the full amount of premiums paid thereon, being the sum of Seven 50/100 Dollars, which find enclosed.

Please receipt for same on this letter and return to me.

Yours truly,

THOMAS E. BOND,
Adjuster Caledonian Insurance Company."

Mr. Hutton, the Deputy Fire Marshal, testified that at the request of Mr. Bond he made an investigation of the burning of the appellant's houses; that he talked with a number of people; that he examined the appellant under oath on the 25th January, 1908, and that his questions and the appellant's answers were written down; that "Mr. Bond was thor-

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oughly conversant with everything;" that he, Mr. Bond, read over the statement of the appellant "the same day or the next day after it was taken," and was in the Fire Marshal's office "almost daily relative to the matter." This statement is set out in the record, and not only contains all the information required to be furnished by proofs of loss, but the questions asked the appellant clearly indicate that he was under the suspicion of having set fire to the property. There is also evidence tending to show that according to a general custom the adjuster furnishes the insured with blank proofs of loss, unless he determines not to pay the loss, in which event all discussion and negotiations with the insured cease. This evidence was stricken out on motion of the defendant, but we think it was admissible, not for the purpose of imposing on the insurer an additional obligation, or because the failure of an adjuster to furnish the blanks in accordance with such a custom as the evidence disclosed would, standing alone, amount to a waiver, but in connection with other evidence in the case, as reflecting upon the question whether the conduct of the insurer, or its agent, under the circumstances, induced the insured to believe that proofs of loss would not be required.

From this statement of the facts in the case it is apparent that there was error in the instruction granted. The conduct of the adjuster under the circumstances of this case, could have lead the plaintiff to but one conclusion, namely: that proofs of loss were not required, and that the company would either pay the loss or deny all liability under the policies. He was directed by the adjusters, after they had visited the scene of the fire, to meet them at Mr. Deming's office; he met them there, and after they had discussed the loss, Mr. Deming told him to make out a list of the furniture destroyed, and Mr. Bond told him he would hear from him. He was then required, at the instance of Mr. Bond, to make a statement under oath to the Fire Marshal. Having thus furnished the defendant's adjuster all the information that was required by the terms of the policies; knowing that he was suspected of

having set fire to the property, when Mr. Bond again told him at the Fire Marshal's office that he would hear from him, he had every reason to believe that nothing more would be required of him, and that he had only to wait until the company concluded to either settle the loss or deny liability. Under such circumstances, it cannot be said that there is no evidence of a waiver by the insurer of a condition in the contract the only object of which was to enable it to secure information concerning the nature, character and extent of the loss. *Farmers' Fire Ins. Co. v. Baker*, 94 Md., page 555.

The rule that an unqualified denial of liability by an insurance company within the sixty days allowed for filing proofs of loss will constitute a waiver is not denied by counsel for the appellee. For the same reason any other statement or conduct of the insurer within the sixty days that is calculated to mislead the insured and to induce him to believe that proofs of loss will not be required, will, if acted on by the insured, have the same effect.

Since the argument of this case, our attention has been called to the decision, February 1st, 1910, of the U. S. Circuit Court of Appeals in the case of *John Bakhaus and wife v. Germania Fire Insurance Co.* In that case the Court was dealing with an entirely different question. There the policy was void at the time of the fire, under the provision prohibiting other insurance, and the Court, applying the rule of the Federal Courts that the doctrine of waiver "can only be invoked where the conduct of the companies has been such as to induce action in reliance upon it, and where it would operate as a fraud upon the assured if they were afterwards allowed to disavow their conduct, and enforce the conditions," held that the conduct of the adjuster, after the fire and after the forfeiture of the policy, did not amount to a waiver of the condition. In the opinion delivered by JUDGE BRAWLEY, the Court, referring to the statement of the adjuster to the insured "you will hear from me," says: "If this had been said after the discovery of the over insurance and before the fire, it might have been argued with some

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plausibility by the insured that: if you had notified me of the company's intention to insist upon the forfeiture, it would have been in my power to protect myself by other insurance, and it might be claimed that the insured was misled to his prejudice into believing that the company, with full knowledge of the fact, would not insist upon the forfeiture." In the case at bar, at time of the alleged waiver, there had been no forfeiture of the policies, and the reasoning of Judge Brawley, as applied to the question with which we are dealing, does not seem to be in conflict with the views we have expressed.

The policies were issued to the appellant alone, and it appears from the evidence in the case that the property belonged to the appellant and his wife as tenants by the entireties, and that at the time the policies were issued there was a mortgage on the property for \$350.00. The appellee contends that the policies were, therefore, void under the conditions requiring the insured to be the unconditional and sole owner, and his interest to be truly stated in the policy, while the appellant insists that these provisions were waived or modified by the riders making the loss payable to the assured "as interest may appear."

There can be no doubt as to the meaning or object of these provisions. It is of importance for the insurer to be informed of the nature and extent of the insured's interest, in order that it may judge of the character of the risk. In the case of *Bowman v. Franklin Fire Ins. Co.*, 40 Md. 620, JUDGE ALVEY says that: "The great purpose of all such provisions in policies of insurance is to enable the insurer to determine the extent of the risk, and the nature and extent of the interest of the insured in the premises." In *Richards on Insurance*, sec. 237, the author says: "The policy not infrequently insures one or more persons 'as interest may appear.' It is sometimes convenient to use this phrase where the interests are shifting or uncertain; for example, where owner and creditors or lienors desire protection by one policy, or where the owner has died and the vesting of interests may

be ill-defined, or contingent and for a time, perhaps, unrepresented by an executor or administrator, or where owner and tenant require security under the same insurance, or where vendor and vendee wish to be covered during a pending contract of sale in part performed.

"In considering the application and effect of the phrase a clear distinction must be observed between the frequent use of the words 'as interest may appear' in connection with the names of the assured, and the frequent use of the same words in connection with any third party named in the policy as a mere payee or appointee to receive the insurance money. In the latter instance the payee takes only what the assured is entitled to receive, and if the assured has broken a warranty the payee gets nothing." In the case of *Dakin v. Liverpool, London & Globe Insurance Company*, 77 N. Y. 600, the policy contained conditions avoiding the policy if the interest of the insured was not truly stated therein or other than unconditional and sole ownership, and the policy was issued to the insured "as interest may appear," and the Court held, quoting from the syllabus, that, "Where to the name of the insured, in a policy of fire insurance, are added the words, 'as interest may appear,' this indicates uncertainty, not only as to the extent, but as to the quality or character of the interest; the use of the phrase authorizes the insured, in case of loss, to show what his interest was; and the policy has the same effect as if the facts as to the interest as subsequently shown were inserted in the policy.

If, therefore, it thus appears that the insured, although not the owner, had an insurable interest, there is no breach of a condition of the policy forfeiting it in case the interest of the insured is not truly stated in the policy, or, if the interest is less than absolute ownership, and it is not so represented in the policy." It is said in 19 Cyc. 699: "If a policy is made payable to a designated person 'as his interest may appear,' there is no necessity for a specific statement as to the payee's interest, the policy amounting to a waiver of such a requirement. But this does not excuse a breach of condition as to

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statements of title on the part of the insured, the payee not being regarded as such, nor the insurer as charged with notice of the nature of the payee's interest." *Agr. Ins. Co. v. Hamilton*, 82 Md. 88.

It is, therefore, clear upon authority that where the loss is made payable to a *third person* "as his interest may appear," the conditions of the policy referred to are not waived, but where the policy is issued to the insured "as his interest may appear," they are waived. Keeping in view the object of these provisions, it would seem equally clear upon reason that where the loss is made payable to the *assured* "as his interest may appear" that the interest referred to is the interest of the assured in the property, and that the intention of the parties to the contract was to protect that interest, whatever it might be. The assured cannot be treated as an assignee of the policy or appointee to receive the amount of loss. His interest in the amount of loss is derived from his interest in the property, and it would be a contradiction to say to the assured, your policy will be void if your interest is "other than unconditional and sole ownership" or is not truly stated in the policy, but the loss will be payable to you as your interest *may appear*. We fully concur in the view of the learned Court below that this provision of the rider would be meaningless unless it amounts to a waiver of the conditions referred to, and that it indicates an uncertainty in the minds of the parties to the contract as to the nature and extent of the insured's interest in the property, and that the agreement was that, in case of loss, the insured should receive the benefits of the policies according to his interest in the property. This construction affords ample protection to the insurer, and gives effect to a contract that would otherwise have been void at the time it was executed. *Hagan v. Scottish Ins. Co.*, 186 U. S. 423.

The fifth plea in the first case and the sixth plea in the second case (the two cases having been consolidated after the pleas, replications and rejoinders, etc., were filed), assert the proposition that the policies were void under the provision

requiring the interest of the assured to be truly stated in the policy, because it was not stated in the policy that the property belonged to the insured and his wife, while in the eighth plea in the first case and the thirteenth plea in the second case the defendant relies on that provision and also the sole ownership clause, and charges that the policies were void because they were issued to the insured alone whereas the property was owned by the insured and his wife. By its seventh plea in the first case and its twelfth plea in the second case the defendant set up the defense that the policies were void, under the provision requiring the insured's interest to be stated therein, by reason of the undisclosed mortgage, to which the plaintiff replied that the existence of the mortgage "was not a material fact or circumstance to the risk of this insurance." The Court below overruled plaintiff's demurrers to the fifth, sixth, eighth and thirteenth pleas referred to, and sustained the demurrers to the replications to said seventh and twelfth pleas, but as we have already decided that these conditions of the policies were waived by the riders making the loss payable to the "assured as interest may appear," it is not necessary to pass on the questions raised by the demurrers to these pleas and replications. Nor is it necessary to review the rulings of the Court below sustaining the demurrers to plaintiff's first replications to defendant's third and fourth pleas in each case. In those pleas the defendant relied on the failure of the plaintiff to furnish proofs of loss, and the plaintiff replied that the defendant had waived the provision requiring him to do so. The Court below sustained the demurrers on the ground that the replications were prolix and argumentative, and the plaintiff then filed additional or amended replications alleging waiver of proofs of loss, on which issues were joined. Where a demurrer to a plea or replication is sustained, and the pleader gets the full benefit of his defense or reply in an additional or amended plea or replication he is not prejudiced by the ruling on a demurrer even if the Court erred. *Moses v. Allen*, 91 Md. 42; *Fisher v. Diehl*, 94 Md. 112; *Bowman v. Little*, 101 Md. 273. What

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we have just said applies also to the rulings on the demurrers to the first replications to the eighth and ninth pleas in the second case. These replications were held bad for duplicity, and the plaintiff then filed additional or amended replications setting up, in different forms, the same matters in reply to the pleas.

We find no error in the rulings in the first, second and third bills of exception. Section 8 of Article 50 of the Code of 1904 provides that, "Where two or more actions or obligations conditioned for the payment of any money or two or more actions on the case arising *ex contractu* by and between the same plaintiff and the same defendant shall be brought at the same term, the Court in which such actions are pending shall, on motion of the defendant, order the said actions to be consolidated and when consolidated shall direct the clerk to tax the cost of but one action."

The plaintiff was asked by his counsel if he had ever read his policies, and the question being objected to, the witness was then asked: "Prior to the receipt of these letters of April 6th, 1908, state whether or not you knew that it was necessary for you to make out any further formal proofs of loss," and the second exception is to the refusal of the Court to permit the question to be answered. A party cannot profit by his own neglect, and, in the absence of fraud or mistake, the plaintiff was bound by the terms of his contract, whether he was familiar with them or not. In *Hartford F. Ins. Co. v. Keating, supra*, the Court said: "The law assumes that parties understood the words they have used, and, therefore, unless there are potential reasons to the contrary, they are bound by the legitimate and usual meaning of the phrases they employ."

The third exception is to the refusal of the Court to allow the plaintiff on re-examination to answer the following question, "Will you state whether or not, just before you went to see Mr. Rosenbush, you had received any notice from anybody that the Caledonian was going to refuse to pay these policies " We do not see the object of this question. The

plaintiff went to see Mr. Rosenbush just before he received the letters from Mr. Bond, and long after the sixty days had elapsed and after the alleged waiver of the proofs of loss, and the fact that he then received the same information that he received a few days later by the letters from Mr. Bond would have been immaterial. It was not necessary for him to account for his going to see Mr. Rosenbush. Whether he went because he had been told that the defendant would not pay the loss, or because he had not heard from Mr. Bond, was not important. After having waited, under the circumstances, as long as he did without hearing from Mr. Bond, it was only natural that he should have consulted an attorney, and the fact that he did so after getting the information suggested in the question, would not have reflected upon any of the issues of the case.

The question as to the effect of the riders, making the loss payable "to the assured as interest may appear," which we have already determined, was raised by plaintiff's replications to pleas alleging forfeiture of the policies under the sole ownership clause and the provisions requiring the interest of the assured to be stated, etc. The defendant demurred to one of the replications in each case, which demurrers were overruled, and filed a rejoinder to the other replications to which the plaintiff demurred, and the Court sustained the demurrer. The plaintiff did not further reply to or join issue on the replications, but the case was tried on issues joined on other pleas, replications and rejoinders. The question having been determined by the Court below, by its rulings on the demurrers to plaintiff's replications and to defendant's rejoinder, and its ruling on defendant's first prayer, in favor of the appellant, it is not strictly before us on this appeal, but as it goes to the right of the plaintiff to recover at all, and will arise on a retrial of the case, it would be useless to remand the case for a new trial if the contention of the appellee is correct, and it is proper that it should be disposed of. 1 *Poe's P. & P.*, 710; *Walter v. Wicomico Co.*, 35 Md. 395; *Boehm v. Baltimore*, 61 Md. 261; *Lycoming F.*

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Ins. Co. v. Langley, 62 Md. 196; *McElroy v. John Hancock L. Ins. Co.*, 88 Md. 137.

The question presented by the defendant's demurrer to the replication to the fifth plea in the second case, and by its third prayer, which was also decided in favor of the appellant, while it only relates to the plaintiff's right to recover on one of the policies, will necessarily arise on a second trial of the case and ought to be disposed of also. The Court below held, and we think properly, that as the buildings had not been completed at the time of the issuing of the policy and at the time of the fire, and were, therefore, unoccupied, the effect of the agreement annexed to the policy, giving permission to make completions, was to waive the provisions of the policy and warranty, requiring them to be occupied, until they were completed. It is not a question of the authority of the agent who saw the property and delivered the policy to waive any of its provisions, but of construction of the contract. The houses had not been completed and were not occupied at the date of the policy, and the agreement added to the policy, signed by an agent authorized to execute and issue it, gave the insured permission to complete them. Under such circumstances what is the proper construction of the contract? In view of the fact that they had not been completed what does the permission granted mean? The provision of the contract relied on by the appellee can only apply to houses that are completed and ready for occupancy, and it would be an empty statement to say to the insured you have permission to complete houses that are already completed. On the other hand, a policy containing such conditions, issued to cover buildings not completed, would be void (after the ten days vacancy allowed), in the absence of some agreement suspending the operation of the conditions until they had been completed. There is nothing in the terms of the permission granted limiting it to ten days, and the only reasonable construction of the contract, and one that will give effect to the provisions relied on and the permission granted, is that the conditions were not intended to apply until the

houses were completed and ready for occupancy. We said in the opinion delivered by JUDGE BURKE, March 2nd, 1910, in the case of *Stevens v. Clarke*, ante, page 659: "It is needless to quote authorities to show that in the construction of a contract the intention of the parties as it appears from the whole agreement must be ascertained and given its full effect. The rule of construction was stated, with great clearness, in *Nash v. Towne*, 5 Wallace, 699, as follows: 'Courts, in the construction of contracts, look to the language employed, the subject matter, and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and, in that view they are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described.' " The same rule was stated in *Dodge v. Hughes Co.*, 110 Md. 374. In 19 Cyc. 727, referring to provisions avoiding the policy in case the property becomes vacant, it is said: "Despite such general provisions, the real contract may have been that the premises were insured as vacant premises. In this event forfeiture clauses permitted to remain in the policy form have no application." In the case of *Luck v. Orient Ins. Co.*, 176 Pa. St. 638; 35 Atl. R. 247, the property was described as occupied by the insured as a distillery, and the policy contained a provision that if the subject of insurance was a manufacturing establishment, the policy should be void "if it cease to be operated for more than ten days." The distillery was not in operation at the date of the policy or at the time of the fire, and had not been for several years, and the company claimed that the policy was void under the provision referred to, but the Court said: "It was a distillery, and intended by the owner as such, but not operated, and he did not know when it would be started. He occupied then as he had for years before, and as he did for months afterwards, although in the whole time he did not distill a quart of whiskey. And, without misrepresentation

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or concealment, this is just what the company, by its policy, insured,—an occupied, idle distillery,—no matter what the scope of the authorities of its agent. The agent did not frame the policy and insert the description. That is the company's instrument. Every contract must be interpreted in view of the subject of it, and the surroundings of the parties at the date of it."

The question presented by the defendant's fourth prayer may not arise on the second trial, and will not be considered.

It follows from what we have said that there was error in the ruling in the fourth bill of exception, and in the granting of defendant's second prayer, and that because of these errors, the judgment of the Court below must be reversed and case remanded.

Judgment reversed with costs, and new trial awarded.

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INSURANCE.

ALTERATIONS.

1. If deed after delivery.

After the grantor has executed, acknowledged and delivered a deed no subsequent alteration made in it by him can affect the estate of the grantee. *Clark v. Creswell*, 339.

ANNUITIES.

1. Apportionment of Annuities.

The general rule is that an annuity is not apportionable, and if the annuitant dies before the day fixed for payment, his personal representatives are not entitled to a proportionate part of the annuity for the time between the last day of payment and the day of his death. *Brown v. Koffman's Admrs.*, 398.

2. Exceptions to this rule are made in the case of annuities given by a parent for the support of an infant child, or by a husband to his wife in lieu of dower, or for her support if living separate from him. *Ibid.*

3. An annuity given by a testator to his son's wife in case she survives her husband is not apportionable. *Ibid.*

ANNUITIES—Continued.

4. The will by which a trust was created for the benefit of the testator's son provided that in case the wife of the *cestui que trust* survived him the trustees should pay to her the sum of \$6,000 a year during her life, said annuity to commence from the time of the death of the said son and to be paid quarterly. The annuitant died between two of the periods at which the annuity was made payable. *Held*, that this annuity is not apportionable and that the administrators of the widow are not entitled to receive from the trustees the proportion of the annuity from the time of the last quarterly payment to her to the day of her death. *Ibid*.

APPEAL.**1. From Circuit Court on appeal from Justice of the Peace.**

An appeal lies to this Court from a judgment of the Circuit Court on appeal from a Justice of the Peace, when the Justice had no jurisdiction of the case, because the defendant had not been summoned. *Smith Premier Co. v. Westcott*, 146.

2. Repugnancy between granted instructions.

A judgment will not be reversed on account of inconsistency between granted instructions unless it be such as may reasonably be supposed to have misled or confused the jury. *Canton Lumber Co. v. Liller*, 258.

3. Reversible error in admission of evidence.

When the evidence produced by the plaintiff to show that the defendant negligently exposed plaintiff's cattle to infection by disease at a certain place is not clear and conclusive, the admission of incompetent evidence to show that other cattle subsequently became infected at that place is reversible error. *Balto. and Ohio R. Co. v. Dever*, 296.

4. From order appointing receiver.

Upon appeal from an order appointing a receiver upon a bill alone, orders subsequently passed in the cause are not before this Court for review. *Balto. Skate Mfg. Co. v. Randall*, 411.

5. Inadequate exception.

An exception taken to "the line of argument" of counsel before the jury will not be considered when it fails to set forth the ruling of the Court on the exception. *Annapolis Gas Co. v. Fredericks*, 449.

APPEAL—*Continued.*

6. Rules as to records and briefs on appeal.

An appeal will not be dismissed merely because the appellant failed to pay the cost of printing the record within ten days after receipt of notice from the Clerk of the Court of Appeals, as is required by Rule 34, if the record was in fact printed and ready when the cause was called for argument in regular order. *Havre de Grace v. Fletcher*, 562.

7. An appeal will not be dismissed on account of the failure of the appellant to furnish copies of his brief to opposing counsel three days before the case is called for argument, as is required by Rule 36 of this Court. That rule prescribes a different penalty for failure to comply with it. *Ibid.*

8. Summons and severance.

When one of the two defendants in a joint judgment has not appealed, and the other defendant, who does appeal, applies for a writ of summons and severance, which is returned *non est* as to the other defendant, the better practice is for the appellant to support then his application for a severance by affidavits showing what efforts have been made to find the other defendant, or to have him unite in the appeal. If he can be found outside of the State, the Court may authorize notice of the application for severance to be served on him where found, and if his whereabouts cannot be ascertained, the Court can grant a severance. *P., B. and W. R. Co. v. Stumpo*, 571.

9. The record in this case showed that A. and B., the two defendants against whom a joint judgment was rendered, filed an order for an appeal. Afterwards A. applied for a writ of summons and severance on the theory that he alone had taken the appeal. Two returns of *non est* as to B. were made to the writ. At the argument of the appeal B. did not appear, and no brief was filed by him. *Held*, that no injury can be done to B. by granting a severance, since, if he did enter an appeal he was in default, and if he did not, the time to do so has expired. *Ibid.*

10. Extension of time for signing bills of exception.

The trial Court has the power to grant successive extensions of the time allowed for the signing of bills of exception when the first extension is made before the end of the term of Court at which the case was tried, and each subsequent extension is

APPEAL—Continued.

granted before the expiration of the time fixed by the preceding order extending the time. *Carter v. Md. and Pa. R. Co.*, 599.

ARCHITECTS.

See **CONTRACTS**, 16.

ASSAULT.

1. Liability of railroad company for assault made by its special policeman.

When a special police officer employed by a railway company makes an assault upon a person or arrests him on the premises of the company, it is generally a question for the jury whether the officer was at the time acting within the scope of his employment so as to render the company liable for an unjustifiable assault or arrest. But when an assault or arrest is made by an employee not on the premises of the company, and not for an offense of which the company had a right to complain, the Court will determine as matter of law, that the employee was not acting within the scope of his employment. *P., B. and W. R. Co. v. Stumpo*, 571.

2. One H. was appointed by the Governor a special policeman for the protection of the property of a railway company and for the preservation of peace on its premises, and he had made arrests of men for stealing rides on freight trains and of persons who were disorderly on the premises of the railway company. The plaintiff, who had been employed by the company, was discharged by a track foreman. A few days afterwards, H. was informed that the plaintiff had made threats against the foreman and was lying in wait to do him harm. Thereupon H. assaulted the plaintiff on a public highway, beat him severely and arrested him on the charge of carrying concealed weapons. Plaintiff had done nothing that would justify his arrest by the company or its agents, and was not on the premises of the company at the time of the arrest. In an action to recover damages therefor, *held*, that under these circumstances it was necessary, in order to recover against the railway company, for the plaintiff to show that the assault and arrest were made by its authority or were within

ASSAULT—Continued.

the scope of the employment of H., and since there was no evidence to that effect, the plaintiff was not entitled to recover against the railway company. *Ibid.*

See CARRIERS, 3, 4, 5.

ATTACHMENT.**1. Attachment against person adjudicated bankrupt within four months thereafter.**

The Federal Bankrupt Act (sec. 67F) provides that all judgments, attachments or other liens, obtained against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudicated a bankrupt and the property affected by the attachment or other lien shall be deemed wholly discharged and released from the same. An attachment was issued against the defendant on December 19th, 1905, which was dissolved upon the filing of a bond by a surety on December 28th. On February 26th, 1906, the defendant was adjudicated a bankrupt and finally discharged in January, 1909. *Held*, that the plaintiff in the attachment is not entitled to ask for a judgment against the defendant with a perpetual stay of execution in order to be enabled to proceed against the surety on the bond given to dissolve the attachment, but that, under the terms of the Bankrupt Act, the attachment became void, since it was issued within less than four months before the institution of the proceedings in bankruptcy; that if tangible property had been attached it would have been released from the lien, and there is no reason why the bond, which stands in the place of property, should not also be released. *Crook-Horner Co. v. Gilpin*, 1.

BANKRUPTCY.

See ATTACHMENTS, 1.

BENEFIT SOCIETIES.**1. Change in by-law invalidating previous designation of beneficiary.**

An unmarried man on becoming a member of a benefit society designated his mother as his beneficiary in case of his death,

BENEFIT SOCIETIES—Continued.

in accordance with the rules of the society then in force. He agreed to conform to the existing by-laws or those which might thereafter be adopted. He afterwards married and died, leaving his widow surviving, without having changed the designation of his beneficiary. Both his mother and his widow claimed the fund which became payable under the certificate on his death. After he became a member and before his marriage, the society adopted a new by-law, which provided that when an unmarried man or widower designated as his beneficiary a person other than his own children, and subsequently marries, the subsequent marriage of such member will have the effect of rendering such designation void. But it shall be lawful for such member to redesignate the same beneficiary. Should such member die without making a new designation, then the benefit shall be paid in accordance with a certain classification under which the benefit is payable first to the member's wife, second, to his children, etc. *Held*, that this by-law is retroactive in its operation, and has the effect of invalidating or terminating the designation of this member's mother as his beneficiary and of substituting his wife. *Mathieu v. Mathieu*. 625.

2. The mere designation of a person as beneficiary by a member of a mutual benefit society does not confer upon the person so designated any vested right in the fund on the death of the member. *Ibid*.

BILLS AND NOTES.**1. Rights of holder in due course of accommodation check.**

One who discounts a note or a check in due course, without actual knowledge of any fraud or defect invalidating the same in the hands of the payee, is entitled to enforce payment against the maker, although he executed the note or check without consideration and for the accommodation of the payee. *Weant v. Southern Trust Co.*, 463.

2. The defendant gave to one P. his check on a bank for a certain amount for P.'s accommodation. P. deposited the check in his account with the plaintiff bank, received credit therefor and drew out the whole amount. On the day he gave the check, defendant notified his bank on which it was drawn not to pay it, and the plaintiff was therefore obliged to take

BILLS AND NOTES—Continued.

it up. Afterwards P. gave to the plaintiff promissory notes for the amount of the check, which plaintiff agreed to receive as security upon condition that defendant endorse the same. Defendant refused to endorse the notes, and they were not paid by the maker. *Held*, that the plaintiff is entitled to recover from the defendant the amount of the check with interest from the date thereof less a certain sum which P. had paid on account. *Ibid*.

BONDS.

See CORPORATIONS, 2, 3.
EQUITY, 8.

BRIDGES.

See COUNTIES, 1.

CARRIERS.

1. Liability for exposing cattle to infectious disease—Evidence of carrier's negligence.

The carrier of live animals is not liable as an insurer for death or injury to cattle caused by a disease to which they were exposed during the shipment, but is only liable for negligence in exposing them to such disease. *Balto. and Ohio R. Co. v. Dever*, 296.

2. Certain cattle carried by the defendant for the plaintiff in two shipments from Missouri to Maryland were found, soon after delivery, to be infected with a disease called Texas fever. In an action to recover damages therefor, under a declaration charging that the infection was caused by the defendant's negligence during the transportation, the evidence on the part of the plaintiff showed that the cattle in both shipments were certified by Government inspectors to have been in good health when first shipped; that they were unloaded at the B. yards to be fed and rested, and reloaded in the same cars for further transportation to the place of delivery; that at these yards the cattle were placed in pens used only for animals not coming from an infected territory, which pens were separated from the quarantine pens by an alley twenty feet wide, and also by a dead alley, ten feet wide; that there was a board fence between the two alleys, with an inch space be-

CARRIERS—Continued.

tween the planks, and a wire fence between the pens where these cattle were placed, and the dead alley. There was also evidence that Texas fever is caused by fertilized female ticks which, upon dropping off from infected cattle, deposit their eggs on the ground; that after these are hatched into larvæ, they crawl on other cattle and produce the infection by their bite; that these ticks cannot crawl far, but may be carried a long distance by the wind, by other animals, or on the clothing of men; that the proper precaution against infected cattle should be a stone wall or an absolutely tight board fence, six feet high, and that there should be no communication by animals between the quarantine pens and others, as the tick can pass through a small crevice; that the disease was developed in plaintiff's cattle within about the period required for development after leaving the B. yards, and the expert evidence was to the effect that plaintiff's cattle had been infected at these yards. *Held*, that the evidence is legally sufficient to be submitted to the jury to show that the defendant had been negligent at these yards in not taking proper precaution to guard the cattle of plaintiff while there from the danger of infection from the quarantine pens. *Ibid*.

3. Liability of railway company for assault and arrest of passenger at station by agent—Measure of damages—Whether agent was acting within the scope of his employment.

A person who comes on the grounds or approaches of a railway station for the purpose of taking passage on a train is a passenger, and the railway company is liable in damages for an assault there made on him without just cause by one of its employees, acting within the scope of his employment, and for the subsequent imprisonment of such person. *P., B. and W. R. Co. v. Crawford*, 508.

4. When the arrest and imprisonment of a passenger is made by an officer or agent of a railway company in charge of its station and grounds, it is for the jury to decide whether the arrest was made by the officer acting within the scope of his employment. *Ibid*.

5. In an action for false arrest and imprisonment, the jury was properly instructed that if they found for the plaintiff, under other prayers, then, in assessing damages, they are at liberty to take into consideration the nature of the force applied to the plaintiff, his sense of indignity and humiliation, and

CARRIERS—*Continued.*

award him such sum as, under all the circumstances of the case, they may deem a fair and reasonable compensation therefor. *Ibid.*

6. When the evidence in the case is legally sufficient to show that the plaintiff was assaulted without just cause on the premises of the defendant railway company, and that the person who made the assault was the agent of the company, acting within the scope of his employment, prayers offered by the defendant withdrawing the case from the jury for lack of evidence were properly refused. *Ibid.*
7. A prayer offered by the defendant railway company instructed the jury that if a third party asked the defendant's employee to arrest the plaintiff when he was not on the grounds of the defendant, and the employee pursued the plaintiff and arrested him after he had gotten on the defendant's premises, then the defendant is not liable. *Held*, that this prayer was properly rejected, and that the Court correctly told the jury, in place of it, that if they found that at the time the defendant's employee first undertook to arrest the plaintiff, he was in the public highway, and that the actual arrest was made on the grounds of the defendant, in the course of the pursuit of the plaintiff begun upon the highway, not in the course of the performance of his duties by the employee, then their verdict should be for the defendant. *Ibid.*
8. When the question is whether an arrest made by an agent of the defendant was made when he was acting within the scope of his employment or not, a witness cannot be asked to state whether that agent had ever previously made an arrest of any person while acting as an officer of the defendant, within the scope of his employment as such. The error in the admission of such evidence is not cured by the circumstance that the Court admitted it only to show that the defendant had knowledge of the fact that such an arrest was within the scope of the agent's duty. The opinion of a witness that other arrests were made by an agent within the scope of his employment is not admissible. The question of fact for the jury to decide was whether or not this arrest was made by the agent while so acting. *Ibid.*

See ASSAULT, 2.

CHECKS.

See **BILLS AND NOTES**, 2.

CHURCHES.

See **RELIGIOUS SOCIETIES**.

CONDEMNATION.

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CONDITIONS.

See **CONTRACTS**, 9.

CONFESSIONS.

See **CRIMINAL LAW**, 14.

CONSPIRACY.

See **CRIMINAL LAW**, 1, 5.

CONSTITUTIONAL LAW.**1. Cruel and unusual punishment.**

The sentence of ten years in the Penitentiary imposed upon a prisoner convicted of threatening to burn a man's buildings unless money be paid to him is not a cruel and unusual punishment, the statute authorizing that offence to be punished by confinement in the Penitentiary for not less than two nor more than ten years. *Toomer v. State*, 285.

CONTINGENT REMAINDERS.

See **DEVISE AND LEGACY**, 10.

CONTRACTS.**1. Building contract—Substantial compliance with specifications—
Recoupment for deficiencies in action for contract price—
Measure of damages—Instructions.**

In an action to recover a balance due on a building contract, a prayer instructing the jury that if the plaintiff erected the building in substantial accordance with the terms of the contract, and it was used and accepted by the defendant, then the plaintiff is entitled to recover, is not open to the objection that it declares that a substantial compliance with the specifications entitles the plaintiff to the full contract price. This

CONTRACTS—*Continued.*

prayer goes simply to the plaintiff's right of recovery, and the measure of damages was dealt with in a subsequent instruction. *Iron Clad Mfg. Co. v. Stanfield*, 360.

2. When the building as erected by a contractor is in substantial conformity with the specifications, but there are in it certain deviations and deficiencies, there should be deducted from the contract price the difference between the value of the building as erected and the value of the building contracted for, and the contractor is entitled to recover the contract price less that sum. *Ibid.*
3. When a contract calls for the erection inside of a building of a loading platform of the same height as the floor of freight cars on an adjoining track, then, if the owner requests that the construction of a platform be postponed until the elevation of the track is ascertained, the builder is not responsible for the delay so occasioned. *Ibid.*
4. No deductions from the contract price of a building should be made on account of deviations from the specifications made by direction of the owner, or on account of damage to a wall in the building caused by a third party acting under the orders of the owner. *Ibid.*
5. In an action to recover a balance due on a building contract, a prayer offered by the defendant instructed the jury that if they found that the plaintiff did not perform the contract in any one of ten enumerated particulars, they should deduct from the contract price the reasonable cost of putting the building in the same condition it would have been if the contract had been performed in all respects. *Held*, that this prayer was properly rejected because, as to some of these particulars, there was no evidence of a failure to comply with the contract, or in others as to what it would cost to make the building conform, and as to one of the particulars the requirements of the contract were not correctly stated. *Ibid.*
6. **Conditional contract—Performance of condition prevented by Promissor—Condition dispensed with—Promise to pay debt when promissor collects a claim—Failure to collect—Assignment of claim.**

If a party who has promised to pay a sum of money upon the happening of a certain event, prevents that event from taking

CONTRACTS—*Continued.*

- place, the condition is dispensed with and the promise to pay becomes absolute. *Rumsey v. Livers*, 546.
7. When a debt exists independently, but as to the time of payment the promise of the debtor is to pay if and when he collects a claim against a third party, he is bound to use due diligence to collect the claim, and if it be not collected by reason of his negligence or fault, the condition is discharged and his promise to pay is enforceable. *Ibid.*
 8. If a party agrees to pay a debt due by him when he collects a certain judgment which he holds, his assignment of the judgment to a third party will be treated as dispensing with the condition. *Ibid.*
 9. Defendant had a contract to put up an electric light plant for a third party, and employed the plaintiff to do a certain part of the construction work, under a contract by which it was provided that defendant should make payments to the plaintiff when he was paid by the third party, and that if defendant did not receive the contract price, the plaintiff should stand his ratio of loss to the amount of the contract. The third party in question gave to the defendant judgment notes for the whole amount of the contract price upon which judgments were entered. The plaintiff did his part of the work, and the defendant completed his contract with the third party, upon which the whole contract price became due. Only a part of the price was paid, but the defendant refused the plaintiff's request to enforce the judgments and afterwards he assigned them to other persons. In an action to recover the balance due to the plaintiff, *held*, that since the defendant had promised to pay his debt to the plaintiff upon receipt of a fund to which he was entitled and for the payment of which he had obtained enforceable judgments, the defendant was under an implied obligation to utilize the means at his command to enforce the payment by the third party upon which his liability to pay the plaintiff was conditioned. *Ibid.*
 10. *Held*, further, that the plaintiff is entitled to recover in this action if the evidence shows that the judgments could have been enforced by due diligence, but remained uncollected through the negligence of the defendant, or if without the consent of the plaintiff, the defendant elected to refrain from

CONTRACTS—*Continued.*

issuing execution, or if he assigned to third persons these judgments in which the plaintiff was interested under his contract, and which he was entitled to require the defendant to retain and enforce. *Ibid.*

11. *Held*, further, that the circumstance that the defendant thought that under an execution sale he might himself become the purchaser of the electrical plant, is immaterial. *Ibid.*
12. In the above-mentioned action, prayers, granted at the instance of the plaintiff, instructed the jury that it was the duty of the defendant to enforce payment of the judgments by execution within a reasonable time, and if the defendant did not do so and the amount of the judgments could have been collected, then the plaintiff is entitled to recover his proportionate part of whatever the defendant could have recovered from the third party. Also that if the defendant without the consent of the plaintiff elected not to issue execution but to indulge the third party as to the payment of the judgments, then the defendant is liable to the plaintiff for the amount due under the contract between them. *Held*, that special exceptions to these prayers for lack of evidence to support them, were properly overruled, because there was sufficient evidence in the case to show that the judgments could have been collected in full, and there was also evidence that the defendant did not refrain from issuing execution by inadvertence, but as the result of deliberate decision taken in spite of plaintiff's requests. *Ibid.*
13. Another prayer granted at the instance of the plaintiff instructed the jury that if the defendant assigned to other persons the judgments without the consent of the plaintiff, that constituted a wrongful conversion of the judgments to the extent of the interest of the plaintiff therein, and the plaintiff is entitled to recover his pro rata part. *Held*, that this prayer does not submit a question of law to the jury, since it was uncontradicted that the plaintiff had a substantial interest in the judgments; also that the reference therein to the plaintiff's pro rata part of the judgments, instead of to the value of his interest at the time of the conversion, is immaterial, since the plaintiff's pro rata part of the judgment was exactly equal to the amount due him under his contract. *Ibid.*

CONTRACTS—*Continued.*

14. The relation between the plaintiff and the defendant in this case was not that of partners sharing profits and losses, but that of debtor and creditor. *Ibid.*

15. Construction of building contract.

A contract for the erection of a factory building provided that the owner should have the option of having a cement floor instead of a wooden floor at a designated additional cost. The owner afterwards elected to have the cement floor. *Held*, that the cost of a wooden floor should not be deducted from the contract price. *Iron Clad Mfg. Co. v. Stanfield*, 360.

16. Architect not authorized to bind owner by agreement to pay sub-contractor for extra work.

An architect employed by an owner of land to supervise the erection of a building thereon by a contractor, according to designated specifications, and without any power to change the agreement between the owner and the contractor, is not authorized to make an agreement with a sub-contractor to do certain extra work, so as to bind the owner to pay the sub-contractor therefor. *McNulty v. Keyser Office Bldg. Co.*, 638.

17. Contract sealed by one party and not by the other—Subsequent parol agreement.

When a seal is attached to the signature of one of the parties to a written contract, but not to that of the other party, the contract as to the latter is a simple contract, while as to the former it is a contract under seal. *Pearl Hominy Co. v. Linthicum*, 27.

18. Consequently, in an action against the party who did not seal the contract, evidence would be admissible to show that it was changed by a subsequent parol agreement, and therefore that party has no ground for invoking the jurisdiction of a Court of equity upon the allegation that such evidence would not be admissible in an action at law. *Ibid.*

19. Sufficiency of evidence to show failure to invest money as agreed.

The plaintiff gave to defendant a sum of money to be invested, and defendant gave her a receipt, stating that that sum had been received "for investment." After several demands for payment, the defendant, more than two years after getting the money, gave the plaintiff a promissory note, bearing date as of the time he received the money, for the amount, paya-

CONTRACTS—Continued.

ble with interest four years after date, and signed by a certain firm "per" the defendant. At the time defendant gave plaintiff this promissory note, the firm had been put in the hands of a receiver. Interest on the money had always been paid by the defendant. In an action to recover the sum, the Court instructed the jury that if they believed that the plaintiff intrusted to the care of the defendant the designated sum for investment, and that the defendant failed to invest said money, and has not repaid the same to the plaintiff, then their verdict must be for the plaintiff. *Held*, that this instruction is proper, since the evidence is legally sufficient to authorize the jury to find that the defendant did not invest the money he received from the plaintiff. *Moyer v. Justis*, 220.

See SALES.

VENDOR AND PURCHASER.

CORPORATIONS.

- 1. Consolidation of corporations—Effect of on right to issue bonds under mortgage by constituent company—Bonds to be issued for after-acquired property.**

Code, Art. 23, sec. 46, which provides a mode by which two or more corporations may be consolidated, directs that the property, rights and liabilities of the former separate corporations shall devolve upon the new consolidated corporation, which shall be regarded as substituted in the room and stead of the former separate corporations. *Held*, that when two corporations are consolidated, their distinct corporate existence and powers perish in the process of consolidation, and that the resultant consolidated company is a new and separate corporation, whose rights are acquired by special grant from the State, and not by way of transfer from the constituent corporations. The consolidated company is not a mere association of co-existing corporations. *Diggs v. Fidelity and Deposit Co.*, 50.

- 2. If a mortgage executed by a corporation to a trustee provides for the issue of bonds to be secured by the mortgage for the purchase of property thereafter by the corporation, then if that corporation be consolidated with another by which a new corporation is created, and the former one ceases to ex-**

CORPORATIONS—*Continued.*

ist, there is no power in the consolidated company to issue bonds for the property acquired by it which shall be entitled to the lien of that mortgage. *Ibid.*

3. In 1904, a gas company executed a mortgage to a trustee by which it conveyed all the property it then owned and all that it might thereafter acquire to secure the payment of 15,000 bonds of \$1,000 each. Of these, 1,015 were to be forthwith certified by the trustee and delivered to the gas company—a certain number were to be used to take up underlying mortgages on the property, and 5,500 bonds were to be issued from time to time to pay a part of the cost of the property to be thereafter acquired by the company. The mortgage provided that these last-mentioned bonds could only be issued and certified by the trustee upon the certificate of an engineer as to the cost and value of the property bought, and a resolution of the directors of the company requesting the trustee to deliver the bonds. In 1906, the gas company was consolidated with an electric light and power company, which had executed a mortgage of its property to the Continental Trust Company. In pursuance of the terms of the consolidation, a mortgage of all its property was made by the consolidated company to the last-mentioned trustee, subject to existing liens. The agreement of consolidation reserved to the consolidated company the right to issue bonds for future acquired property as the successor of the gas company. The consolidated company filed a petition, in an *ex parte* proceeding in a Court of equity in which the trustee of the gas company mortgage had asked the Court to assume jurisdiction of the trust, setting forth that it had bought certain property and asked that the trustee be directed to certify and deliver certain bonds as being entitled to the lien created by that mortgage. This petition was opposed by the appellant on this appeal, who was the holder of bonds issued by the gas company before the consolidation. At the time of the consolidation the bonds which remained unissued by the gas company were those authorized for the payment of underlying mortgages and for the future acquisition of additional property. *Held*, that the effect of the consolidation was to extinguish the corporate existence of the gas company and to transfer its property to the consolidated company. *Ibid.*

CORPORATIONS—*Continued.*

4. *Held*, further that the right to discharge underlying mortgages by the issue of bonds under the gas company's mortgage may be exercised by the consolidated company as an incident to the title to the property it had acquired subject to the mortgage, and that the Court would have jurisdiction to direct the execution of bonds for that purpose. *Ibid.*
5. *Held*, further, that the consolidated company is not authorized to issue bonds under the mortgage of the gas company in payment for property which was not acquired by that company but by the consolidated company, since the latter company cannot comply with the conditions fixed by the mortgage for the issue of such bonds, and the after-acquired property, for account of which bonds were authorized to be issued by the terms of the gas company's mortgage, means only property subsequently acquired by that company. *Ibid.*
6. *Held*, further, that the holders of bonds issued by the gas company before the merger have a right to insist that none of the reserved bonds be issued except in conformity with the conditions fixed by the mortgage, which in effect constituted a contract between the gas company and them. *Ibid.*
7. **Amendment of charter of public service corporation.**

A corporation which has condemned land for a public use in pursuance of its charter cannot afterwards, by an amendment of the charter, divest itself of the public use and then hold the land for private purposes, since a public service corporation can be compelled by a mandamus to perform its public duties, and no such amendment of its charter could lawfully be made. *Webster v. Susquehanna Pole Line Co.*, 416.
8. **Authority of officer.**

The fact that an officer of a corporation had the power to make a contract for it does not prove that he had the power to cancel a contract after it is made. *Sumwalt Ice Co. v. Knickerbocker Co.*, 437.
9. **Liability of directors of corporation for mismanagement.**

The directors of a corporation are not personally liable for the consequences of their unwise management of its business, but are liable only for gross negligence or fraud. *Foutz v. Miller*, 458.
10. A bill by the receivers of an insolvent savings institution against the directors alleged that its funds were wasted and lost

CORPORATIONS—Continued.

on account of the negligence and extravagance of the defendants, and charged that they were personally liable for the loss. *Held*, that the evidence shows that the defendants acted in good faith, and had loaned the institution more money than they had received from it in salaries; that all the money paid to the institution was fully accounted for; that the losses were caused by honest mistakes of judgment, and that consequently the defendants are not liable therefor. *Ibid*.

See LANDLORD AND TENANT, 1.

RAILROAD COMPANIES.

COUNTIES.**1. Liability of County Commissioners for failure to repair bridge.**

Plaintiff was required by contract to do work at a place to which the only means of access was a certain public highway, over which it was necessary for him to haul material for the work. It was the statutory duty of the defendants, the County Commissioners, to keep the highway in repair. On account of their failure to repair a bridge which was part of the highway, the same became impassable; plaintiff was unable to convey in due time the material to the place where his contract required it to be used, which made him liable to a penalty for each day's delay in the work, and he was compelled, at an increased cost, to transport the material in hand cars on a railway. *Held*, that since the wrongful act of the defendants in failing to keep the bridge in repair had caused to the plaintiff an injury different in degree and kind from that suffered by the public at large, he is entitled to recover damages therefor from the County Commissioners. *Anne Arundel County v. Watts*, 353.

COVENANTS.

See RAILROAD COMPANIES, 1.

CRIMINAL LAW.**1. Conspiracy to obstruct administration of justice—Sufficiency of indictment—Evidence.**

The common law offense of conspiracy consists of an unlawful combination and agreement. The agreement may be to commit a crime or to do a lawful act by criminal or unlawful means, but in neither case is an overt act necessary to the

CRIMINAL LAW—*Continued.*

completion of the offense. When the object of the combination is to commit a crime or do an unlawful act, the means by which it is to be accomplished are immaterial, the offense being the unlawful agreement to do an unlawful thing. *Garland v. State*, 83.

2. In an indictment charging the common law offense, the means by which the object is to be accomplished need not be stated, and in stating the object of the conspiracy, it is not necessary to set out the offense with the accuracy or detail which would be required in an indictment for that offense. *Ibid.*
3. This rule does not apply to conspiracies to do a lawful act by unlawful means, but in such case it must appear by the indictment that the means to be employed are unlawful. *Ibid.*
4. To obstruct the due administration of justice is an indictable offense at common law, and Code, Art. 27, sec. 28, provides for the punishment of every person who shall corruptly obstruct or impede, or endeavor to obstruct or impede, the due administration of justice in any Court of this State. *Ibid.*
5. An indictment charging a conspiracy unlawfully and corruptly to obstruct due administration of justice in a certain named case, in a certain named Court, is sufficient, since it states the object of the conspiracy and informs the accused of the crime with which he is charged. *Ibid.*
6. An indictment may contain several counts charging the same offense in different language, so that they apparently charge different offenses. *Ibid.*
7. The defendant was indicted for a conspiracy to obstruct the due administration of justice in a certain Court, and the evidence showed that he agreed to endeavor to induce a Grand Jury to dismiss a charge against a certain person for the unlawful sale of liquor. A witness who testified that he paid the defendant a sum of money may also testify that he paid it because he presumed that the case had been dismissed by the Grand Jury through the exercise of defendant's influence. *Ibid.*
8. The evidence in this case examined and held to be admissible to prove a conspiracy between the defendant and others to obstruct the administration of justice, and that this evidence was corroborated by proof of the admissions and statements of the defendant. *Ibid.*

CRIMINAL LAW—*Continued.***9. Instruction to jury.**

In a criminal case, the Court cannot be required to instruct the jury as to the legal effect or sufficiency of the evidence, since in such a case the jury are judges of the law. *Ibid.*

10. Indictment for sending threatening letter to extort money.

By Code, Art. 27, sec. 395, it is provided that any person who shall send or deliver, with or without signature, any letter threatening to accuse any person of an offense, or do injury to the person or property of anyone, with intent to extort money, etc., shall be guilty of a felony, etc. *Held*, that in an indictment under this statute, it is not necessary that the name of the person to whom the threatening letter was sent should be set forth in it. *Toomer v. State*, 285.

11. When it appears that the several different counts of an indictment relate to the same transaction, and that the form in which the offense is charged was varied in order to meet the possible evidence, the indictment is not obnoxious to the objection that each count charges a distinct offense. *Ibid.*

12. Evidence.

Upon the trial of an indictment, a witness for the State cannot be asked whether anybody other than the defendant was under suspicion, since that is wholly irrelevant to the question of the guilt or innocence of the accused. *Toomer v. State*, 285.

13. When a threatening letter sent to extort money is set out in the indictment and the letter as offered in evidence shows a variation as to the spelling of a word, that is not a variance, when the meaning of the word is not thereby changed. *Ibid.*

14. Confession of prisoner.

The deputy sheriff who arrested the accused did not inform him of the charge, but took him to the office of the State's Attorney before taking him to jail or to a committing magistrate. The State's Attorney said to the accused that he was not obliged to answer questions, and anything he might say would probably not be to his advantage, but might be used against him. *Held*, that a confession then made by the accused in reply to questions was voluntary and admissible in evidence, since it was not extorted by threats or inducements. *Toomer v. State*, 285.

CRIMINAL LAW—*Continued.***15. Remarks to jury by prosecuting officer.**

Upon the trial of an indictment, charging the accused with having sent a letter threatening to burn the buildings of a certain person unless money be paid to him, the State's Attorney, in addressing the jury, said: "Fires have occurred in this county, buildings have been burned, and it was my duty to act in this matter." *Held*, that the refusal of the trial Court to require the State's Attorney to retract that statement is not a reversible error. *Toomer v. State*, 285.

16. Instruction to jury.

After the jury in a criminal case had returned to their room to consider of their verdict, the foreman sent a note to the trial judge asking if they should consider the prisoner's confession. The judge replied that the testimony concerning the confession was a part of the evidence which the jury was at liberty to consider. *Held*, that this instruction was correct, and did not suggest to the jury that they should consider the evidence of the State to the exclusion of the testimony of the defense, or that it was entitled to more weight. *Toomer v. State*, 285.

17. Indictment of sheriff for perjury in making report of expenditures under local law—Evidence.

The Act of 1904, Chap. 213, relating to Allegany County, provides that the County Commissioners shall allow to the sheriff the actual sum of money expended by him in purchasing food and essential clothing for the prisoners in jail, but that no allowance for expenditures should be paid or credited to the sheriff unless the same be reported under oath by him, which oath shall show that the expenditures were lawfully incurred, and that the sheriff himself has not derived any profit therefrom, or consumed or appropriated to himself any part of such purchases. The Act provided that all false swearing in such report and affidavit shall be deemed perjury and be punishable as such. Upon an indictment for perjury against a sheriff under this statute, the evidence showed that the sheriff reported that he had expended certain money in purchasing designated kinds of food for the prisoners in jail, and made affidavit that the report was correct, and that he had not himself derived any profit from the purchases or

CRIMINAL LAW—Continued.

consumed or appropriated to himself any part thereof; also evidence that some of the articles so purchased were not for the use of the prisoners in jail. *Held*, that although the accounts of the persons supplying these articles were made out against the County Commissioners and payment was made therefor by them, and not by the sheriff himself, yet such payment was made upon the report and affidavit of the sheriff, and was in effect the same as if the allowance had been made to him for an expenditure, and evidence of his report and affidavit, and of the falsity thereof is admissible under the indictment. *Hodel v. State*, 115.

18. Different penalties for violation of statute.

The Act of 1904, Chap. 213, provides, among other things, that all false swearing in the report of the Sheriff of Allegany County as to expenditures made by him shall be deemed perjury and punishable as such. The Act also provides that any violation of its requirements shall constitute a misdemeanor and be punishable upon conviction by forfeiture of office, or fine, or imprisonment, or by all three, in the discretion of the Court. *Held*, that these provisions as to punishment for violation of the Act are not repugnant, and that the sheriff, found guilty of making a false report as to expenditures, is liable to the punishment prescribed for perjury. *Hodel v. State*, 115.

DAMAGES.**1. Instruction as to measure.**

A prayer instructing the jury that, "if from the evidence they find for the plaintiff they cannot speculate as to the measure of damages, and unless they find a certain and definite amount as the loss, they cannot find for the plaintiff more than nominal damages," is calculated in some instances to mislead the jury. But since in this case the jury found a verdict for the defendant, the plaintiff was not injured by the instruction. *American Syrup Co. v. Roberts*, 18.

2. Damages within contemplation of parties.

In an action to recover damages for breach of defendant's contract to deliver lumber of a designated kind, at a certain time and place, to be used by the defendant in building a coal tiple, etc., for a railway company, the plaintiff is entitled to

DAMAGES—Continued.

recover the expenses caused by the delay in getting other lumber in place of that furnished by the defendant and rejected for cause; the increased cost of construction by reason of the necessity of doing the work in the winter instead of in the summer; the freight paid by the plaintiff on the rejected lumber, and the cost of unloading the same. These elements of damage may reasonably be supposed to have been within the contemplation of the parties at the time of making the contract. *Canton Lumber Co. v. Liller*, 258.

DEEDS.**1. What constitutes delivery.**

When the grantor has executed and acknowledged a deed and delivered it unconditionally to a third person for the grantee, the conveyance is complete, and the title has passed, although the grantee may be ignorant of the fact of the delivery of the deed to another for his benefit. *Clark v. Creswell*, 339.

See ALTERATIONS, 1.

DEPOSITIONS.**1. Testimony on cross-examination.**

When the testimony taken in chief under a deposition is rejected, then the cross-examination on that subject is not admissible at the instance of either party. *Balto. and Ohio. R. Co. v. Dever*, 296.

DEVISE AND LEGACY.**1. Executory devise—Rule against Perpetuities—Void limitation over in conditional devise to church.**

A limitation after a fee cannot take effect as a remainder, but may be good as an executory devise. *Starr v. Starr M. P. Church*, 171.

2. An executory devise to be valid must take effect upon a contingency or event that must happen within the life or lives of those in being at the death of the testator and twenty-one years thereafter, and if the contingency or event may not happen within that time, the limitation is bad, although the event does in fact occur within that time. *Ibid.*
3. A devise of property to a corporation to be held by it until a certain event occurs, when there is a limitation over, is in

DEVISE AND LEGACY—*Continued.*

violation of the Rule against Perpetuities, if that event may not happen within the existence of a life or lives in being and twenty-one years thereafter, and in such case the devisee takes an absolute fee in the property. *Ibid.*

4. S. leased a lot of ground to a church corporation upon the condition that it and the church building erected thereon should be used for the purposes of a congregation under the control of a certain conference; that no musical instruments should ever be used in worship; that the sexes should be separated in seating, etc. The lease provided for a re-entry and its termination by the lessor or assigns upon a breach of any of the conditions therein. The charter of the church corporation provided that it should hold the property about to be demised to it upon these same conditions, and that the trustees should have no power to mortgage it. Afterwards S. died leaving a will, by which he devised to the church the yearly rent reserved by the lease, to be held during all such time as may elapse before the church authorities shall admit any musical instrument in the church services, or shall hold any fair or festival, etc., "when and upon the happening of any one of these contingencies," the said ground rent should fall in the residuum of the testator's estate. The church corporation filed the bill in this case asking for a decree directing a sale of the land, since the locality had ceased to be a residential district, and that the proceeds be used in the erection of a church elsewhere to be held on the terms specified in the lease and the will. *Held*, that under the lease the church took the property in its own right, and not as trustees; that this leasehold estate was conditional and liable to be defeated by the re-entry of the lessor or his heirs upon the failure to comply with the conditions. *Ibid.*
5. *Held*, further, that by the devise to the church of the reversion in the lot, the leasehold interest was merged and extinguished, and thereafter the church held the property in fee under the will until the church authorities did any of the things specified in the will as affecting the duration of the estate. *Ibid.*
6. *Held*, further, that since the limitation over of the property to the residuary devisees by way of executory devise was to take effect when the church authorities did any one of these spec-

DEVISE AND LEGACY—*Continued.*

ified things, and since these things might not be done within the period covered by a life in being at the death of the testator and twenty-one years thereafter, this limitation is void because in conflict with the Rule against Perpetuities. *Ibid.*

7. *Held*, further, that since the limitation over is void because repugnant to law, the church took an absolute fee simple estate discharged therefrom. *Ibid.*
8. Time of vesting of remainders after a life estate—Construction of a will—Contingent remainders.

When an estate is given by will or deed to become the property of the donee after the termination of a preceding particular interest therein in another person, and the question arises as to when the estate vests in interest in the donee, and as to whether it passes to his heirs in case of his death before the cessation of the preceding estate, two of the established principles of construction are, *first*, that the law favors the early vesting of estates, and the Court will, as a general rule, adopt the earlier period of vesting, when there is more than one mentioned, if not in conflict with the apparent intention of the testator; and, *second*, that notwithstanding the preference of the law for early vesting, the testator has the right to fix the period of vesting at his pleasure, and to make it depend upon a contingency, and when he has done this with reasonable certainty, his wishes will prevail, and the estate will not vest until the happening of the contingency. *Poultney v. Tiffany*, 630.

9. When the particular expressions or words by which an estate in remainder was created by a will have been construed by a decision of this Court, and a definite meaning attached to them, then in a subsequent case, where the language used in another will is in effect the same, the doctrine of *stare decisis* demands that the same construction be made. *Ibid.*
10. A testator gave all of his property to a trustee to hold the same and to pay the net proceeds to his wife during her life, and from and after her death, "this trust shall cease, and the property shall then become the property of all my children, in equal shares or portions, and their respective heirs, executors, administrators and assigns, the child or children of any deceased child in all cases to take the share of the parent." Some of the testator's children died before the termination

DEVISE AND LEGACY—Continued.

of the life estate. *Held*, that the remainders to the children did not vest during the life of the testator's widow, but that they all took contingent remainders dependent upon their surviving her; that in the event of the death of any child during her life leaving issue, such issue would be entitled to the share of its parent; that since those of the testator's children who died in the lifetime of the widow left no issue, the whole estate upon her death passes equally to the surviving children. *Ibid*.

See ANNUITIES, 4.

GUARDIAN AND WARD, 1.

DIVORCE.**1. Evidence of abandonment.**

Upon a bill for a divorce *a vinculo* on the ground of the abandonment and desertion of the plaintiff by the defendant, the evidence examined and held to show that the defendant had abandoned the plaintiff without just cause; that the separation had continued uninterruptedly for more than three years, and is deliberate and final; that the separation of the parties is beyond any reasonable expectation of reconciliation, and that the plaintiff is entitled to a decree of divorce. *Matthews v. Matthews*, 582.

2. Proceedings in former suit.

The answer to a bill for a divorce alleged that the allegations of the bill had been passed upon by a decree of the same Court in a former suit between the same parties, and that no further cognizance ought to be had of the present cause. Neither the testimony nor the decree in the former cause was filed or proved in this suit. *Held*, that the proceedings in the former cause, not having been put in evidence, are not to be considered in determining the present case. *Matthews v. Matthews*, 582.

3. Intention to abandon—Evidence.

In order to constitute a ground of divorce for abandonment, the intention of the one party to abandon the other need not have been formed at the time the actual separation occurred. If after the separation took place, that party entertains the purpose to desert the other, and the separation and the intention continue for the period fixed by statute, that is an abandon-

DIVORCE—Continued.

ment within the meaning of law, and authorizes a divorce for that matrimonial offense. *Taylor v. Taylor*, 666.

4. Upon a bill for divorce by a husband against his wife, the evidence examined and held to show that the defendant voluntarily left her husband's house and returned to her father; that thereafter she refused the requests of her husband to return to his home; that there was no just cause for her refusal; that either at the time of leaving her husband or soon afterwards she formed the intention not to return to him; that this desertion has continued uninterruptedly for more than three years, and is without reasonable expectation of reconciliation, and that consequently the plaintiff is entitled to a decree of divorce. *Ibid.*

ELECTRICITY.

See EMINENT DOMAIN, 2.

EMINENT DOMAIN.**1. Right to condemn determined on bill for injunction.**

The question whether a corporation, seeking to condemn property for its use under an inquisition, is legally vested with the power of eminent domain may be raised under a bill for an injunction to restrain the condemnation proceedings. *Webster v. Susquehanna Pole Line Co.*, 416.

2. Supplying of electric power to all persons a public use.

The supplying of electric power or energy to the public generally, on equal terms, is a public use, and a corporation which supplies such power may be vested with the right of eminent domain to condemn land for its line of poles and wires. *Webster v. Susquehanna Pole Line Co.*, 416.

3. The charter of a Pole Company declared that it was formed to act as a common carrier of electric power or energy, and the right was given to the public, whether individuals or corporations, to demand of the company without partiality all connections and facilities, upon complying with reasonable regulations and rates. *Held*, that the uses declared in the charter are public uses; that the company is bound to supply electricity at reasonable rates and without discrimination to all persons desiring it to the extent of its capacity; that the company is subject to public regulation and control, and that it

EMINENT DOMAIN—Continued.

is authorized, under Code, Art. 23, sec. 366, to acquire by condemnation any property necessary for its purposes, either in fee simple or for a less estate. *Ibid.*

4. Some purposes private.

The fact that some of the purposes for which a corporation is chartered are public and some are private, does not operate to prevent it from acquiring property by condemnation for its public uses, unless those uses are so combined with the private purposes that the two cannot be separated. *Webster v. Susquehanna Pole Line Co.*, 416.

5. Necessity for taking certain property.

The question whether the taking of certain land is necessary for the public purposes of a corporation is one to be determined by the Court to which the inquisition is returned. It is not to be decided upon a bill for an injunction to restrain condemnation proceedings. *Webster v. Susquehanna Pole Line Co.*, 416.

6. Condemnation of easement in land.

A Pole Company chartered to supply the public with electric power and authorized by law to condemn property either in fee simple or the use thereof in fee simple or for a less estate is entitled to condemn certain land of a party in fee simple for its necessary purposes, and also an easement upon other land of the party to cut, trim and remove trees and other obstructions therefrom. *Webster v. Susquehanna Pole Line Co.*, 416.

EQUITY.**1. Mistake.**

A mistake by a party as to the legal effect of a contract he makes affords no ground for relief in equity when there are no circumstances of fraud or undue influence. *Euler v. Schroeder*, 155.

2. Sale of decedent's real estate—Purchaser protected against liability for his debt.

Upon exceptions to the ratification of the sale of the real estate of a decedent, it was objected that certain claims against his estate had been filed in the Orphans' Court and would constitute a lien on the real estate in case the personal property was insufficient to pay his debts. *Held*, that this exception is not a ground for vacating the sale, since the order of ratification

EQUITY—Continued.

provided that the entire proceeds should be held by the trustees subject to the future order of the Court, and until after distribution of the personal property of the deceased under the order of the Orphans' Court, and it is conceded in this Court that the time has now expired for creditors to file their claims; that due notice had been published, and that after the payment of all debts exhibited there remained in the hands of the administrator a large balance for distribution to the next of kin. *Scarlett v. Robinson*, 202.

3. Effect of admissions of the parties.

As a general rule, admissions of parties make it unnecessary to prove the facts admitted; and when all of the parties to a cause are competent to bind themselves, their admissions are sufficient to establish the jurisdictional averments of the bill. *Scarlett v. Robinson*, 202.

4. Creditors' bill against estate of decedent.

The bill in this case filed by the daughter and son-in-law of a testatrix against her executor and devisees alleged that the decedent was indebted to the plaintiffs on account of services rendered and farm products furnished during a period of more than thirty years before her death. The account consisted of entries made in lead pencil, partly on the fly leaves of an old book, all in the handwriting of the daughter, and all apparently with the same pencil or precisely the same kind of pencil, during the whole thirty years. There was nothing to show that the claimants had made any effort to collect the debt until after the death of the testatrix and after the death of her surviving husband. After most of the alleged indebtedness had been incurred many transactions took place between the parties; the testatrix had conveyed a farm to her daughter and had given money to her daughter's children, and by her will had devised property to them. *Held*, that the evidence fails to establish the validity of this claim, and that the bill seeking its enforcement against the real estate of the decedent should be dismissed. *Worthington v. Worthington*, 135.

5. Exception to testimony too general.

Under Code, Art. 35, sec. 3, in an action by or against executors or distributees of a decedent, no party to the cause is competent to testify as to any transaction had with the decedent unless called by the other party. In an equity suit against

EQUITY—Continued.

an executor and devisees, where much evidence was taken, the plaintiff excepted to so much of the testimony of four named witnesses "as purports to give transactions alleged to have been had with and statements made by" the deceased. *Held*, that this exception is too general, since these witnesses were competent to testify as to some matters, and the exception does not designate the particular questions and answers alleged to be inadmissible. The Court cannot be required by such an exception to examine the whole testimony and pick out such questions and answers as are objectionable, because the witness was incompetent to testify as to that particular matter. *Worthington v. Worthington*, 135.

6. Cloud on title created by alteration of deed.

A mother purchased certain real estate for her daughter Eveline to hold during her life, and at her decease to become the property of her heirs and assigns. The deed was executed, acknowledged and delivered by the grantor to the mother. Afterwards, and before the deed was recorded, the husband of Eveline asked her mother to insert his name in the deed, and the grantor at her request interlined the husband's name in the granting clause, and made the property pass to the heirs at "their decease." The deed was not re-executed or re-acknowledged, and these changes were not made with the consent of the first grantee. *Held*, that since the original grantee, Eveline, had acquired a complete estate in the land by the deed as first executed and delivered, that could not be affected by these alterations, and that she is entitled to maintain a bill in equity to have the same declared void as constituting a cloud on her title. *Clark v. Creswell*, 339.

7. Bill by client to vacate contract of compensation with counsel—Undue influence.

Plaintiff's bill in this case alleged that he had employed the defendant as his counsel to conduct certain litigation and had signed a paper agreeing to pay defendant everything over and above a certain amount which defendant might obtain in settlement of the suit, and had afterwards executed a receipt for the sum paid him; that plaintiff executed these papers believing that the litigation had been settled for a certain sum, but that he afterwards learned that a larger amount had been paid to the defendant. The bill alleged that the agreement and release had been obtained by undue influence, and asked

EQUITY—Continued.

that the same be annulled. *Held*, that the evidence fails to support the allegations of the bill, but on the contrary shows that the plaintiff had full knowledge of the terms upon which his suit had been compromised, and that the amount retained by the defendant was that which the plaintiff had agreed should be retained by him. *Etzel v. Duncan*, 346.

8. Mistake—Reformation—Bond delivered without execution by principal.

If a surety executes a bond and gives it to the principal to be executed by him, and then to deliver it to the obligee, and the principal does so deliver it, having simply overlooked the fact that he had not executed it, and the obligee accepts it, believing it was properly executed, not observing the failure of the principal to sign it, all three parties believing that it had been regularly executed and intending that it should be, equity has jurisdiction to correct the mistake by compelling the principal to execute the bond. *Aetna Indem. Co. v. Balto. etc., R. Co.*, 389.

9. When a Court of equity reforms a written instrument it can enforce it as reformed, administering full relief. *Ibid.***10. Rule of Court as to testimony and hearing—Bill dismissed on the pleadings—*Res judicata*.**

A. filed a bill in equity against B. to set aside a transfer of property and for an accounting concerning the alleged indebtedness of B. to him. B. answered the bill, and after a replication was filed, B. asked for leave to take testimony in open Court, which was granted by an order directing that testimony be taken and final hearing had on November 12th. This order was served on A.'s solicitor. Then, on November 12th, the Court made the following decree: "The above cause standing ready for hearing and being considered on bill and answer, and the plaintiff not appearing in Court, and no evidence being offered to sustain the allegations of the bill, and the answer of the defendant denying the equities of the bill," it is adjudged and decreed that the bill be dismissed. A rule of the trial Court provided that after a general replication to an answer either party might have the case set for hearing, and unless leave to take testimony be asked by either party, the case should be placed on the

EQUITY—Continued.

trial calendar and heard upon the pleadings. *Held*, that since neither party took any testimony on November 12, the Court was authorized to hear the case then on the pleadings. *Fledderman v. Fledderman*, 226.

11. *Held*, further, that the decree in effect declared that the cause was ready for hearing; that it was considered on bill and answer; that since the answer denied the equities of the bill the bill was dismissed, and that this was a final decree passing upon the merits of the cause as they appeared from the bill and answer. *Ibid*.

12. *Held*, further, that if the decree was erroneous in dismissing the bill absolutely and not without prejudice, or for want of prosecution, the plaintiff should have appealed, and not having done so, the decree is final and a bar to another suit for the same cause of action. *Ibid*.

13. **Hearing on bill and answer—Rule of Court.**

A rule of the Equity Courts of Baltimore City provides that after the general replication has been entered to an answer of the defendant, or issue joined on a plea, either party may apply to have the cause set for hearing, and unless within five days after service of notice of such application leave to take testimony be asked by either party, the case shall be placed upon the trial calendar and be heard upon the pleadings. *Held*, that if a case is set for hearing and leave to take testimony is asked by either party, and neither party takes any, the Court may proceed to hear the case on the pleadings without further delay. *Fledderman v. Fledderman*, 226.

14. When a decree, after stating that the cause standing ready for hearing was considered on bill and answer, dismisses the bill, that is an adjudication that the answer denying the averments of the bill was taken to be true at the hearing. *Ibid*.

15. **Erroneous construction of rule of Court.**

If an erroneous construction be placed upon a Rule of Court, in consequence of which a certain order is passed, the remedy of the party aggrieved is by appeal, but the order is valid unless reversed on appeal. *Fledderman v. Fledderman*, 226.

EQUITY—*Continued.***16. Hearing on bill and answer—Remand of cause.**

The C. Company agreed to do certain construction work for a railway company, under a contract which provided that the C. Company should give a bond conditioned for its due performance of the contract. Thereupon, the C. Company gave to the railway company a bond executed only by the Aetna Company as surety, but designed to be executed by the C. Company as principal. The omission of the C. Company to sign the bond was not then noticed by the railway company, and the work was begun. Afterwards the railway company, alleging that the C. Company had failed to comply with its contract, rescinded the same and employed a third party to finish it at a cost in excess of the original contract price. The C. Company having been placed in the hands of a receiver, the railway company brought an action on the bond against that company, the receiver and the Aetna Company as surety. When it was discovered that the bond had not been signed by the officers of the C. Company, the bill in equity in this case was filed, asking the Court to direct these officers to execute the bond, alleging that the omission so to do was the result of an oversight. The C. Company admitted the allegations of the bill, but the Aetna Company, which had been made a party defendant, filed an answer alleging that the execution of the bond by the C. Company was a condition precedent to liability on its part, and a condition upon which it was delivered to that company; also that the bond was void as to it and that the plaintiff had been guilty of laches. The answer also denied some of the allegations of the bill, and alleged that the Aetna Company had never consented to be bound until after execution by the C. Company, nor to a delivery of said bond prior to such execution, and since said bond was never executed by the C. Company it was a nullity. *Held*, that since the case was heard on bill and answer, when the averments of the answer must be taken as true, the trial Court erred in decreeing the relief asked for, as it does not clearly appear that the railway company is entitled to relief against the defendants. *Aetna Indemnity Co. v. Balto., etc., R. Co.*, 389.

EQUITY—Continued.

17. *Held*, further, that the cause should be remanded, to the end that the bill may be amended and testimony taken, and if it be established that the railway company is entitled to have the bond corrected, the Court may dispose of the whole matter in the equity case. *Ibid*.

See DEVISE AND LEGACY.

INJUNCTIONS.

JUDGMENT AND DECREE.

PARTNERSHIP.

PARTITION.

RECEIVERS.

TRUSTS AND TRUSTEES.

VENDOR AND PURCHASER.

ESTOPPEL.

1. By statement inducing another person to act.

When a person makes a statement to another which induces the latter to refrain from demanding indemnity from a third party, who was bound to furnish the same, the person making such statement is estopped from afterwards enforcing a claim against the person relying upon the statement who would have been protected against it by the indemnity. *Eareckson v. Rogers*, 160.

EVIDENCE.

1. Relevancy and materiality.

In an action to recover damages for the defective condition of tin cans bought by the plaintiff from the defendant, who was a manufacturer, a witness may be asked whether or not all of the cans manufactured by the defendant were subjected to a certain test, since there was no evidence in the case to show that those shipped to the plaintiff were not manufactured by the defendant. *American Syrup Co. v. Roberts*, 18.

2. Evidence that Government inspectors were mistaken in certifying that certain cattle were free from disease is not admissible when the question is whether they had given an erroneous certificate in regard to other cattle a year previous. *Balto. and Ohio R. Co. v. Dever*, 296.

EVIDENCE—Continued.

3. When the defendant alleged that a cement floor laid by the plaintiff was defectively constructed, the plaintiff may offer evidence to show in what way the defendant had himself damaged the floor after it was laid, and also evidence of admissions to that effect made by the agent of the defendant. *Iron Clad Mfg. Co. v. Stanfield*, 360.

4. When defendant ordered soapstone of a certain quality to be shipped to a third party by the plaintiff, in an action to recover the price, evidence is admissible to show that the goods as delivered were inferior to those ordered; that the plaintiff agreed that defendant might make an arrangement with the third party by which he would keep the goods after making a reduction in the price, and that soapstone of a higher quality might be mixed with the inferior at a reduction in the price thereof made for that purpose. *Deland Mining Co. v. Hanna*, 528.

5. In an action to recover a sum of money alleged to be due, evidence that the defendant would have been able or disposed to pay it if a certain event had happened is irrelevant. *Rumsey v. Livers*, 546.

6. Leading question.

The objection to a question as leading must be made on that ground when the question is asked, so that the examining counsel may put the question in the proper form. *Iron Clad Mfg. Co. v. Stanfield*, 360.

7. Waiver of exception.

Exceptions to certain evidence will be treated as waived when that testimony is subsequently rendered immaterial by an instruction to the jury granted at the request of the exceptant. *Iron Clad Mfg. Co. v. Stanfield*, 360.

8. Cross-examination.

It is within the discretion of the trial Court to refuse to allow questions to be asked on cross-examination relating to matters fully covered by testimony already in the case. *Iron Clad Mfg. Co. v. Stanfield*, 360.

9. Entries in account books.

In an action by a firm to recover the price of goods sold entries in an account book made by one of the partners are not admissible in evidence. *Deland Mining Co. v. Hanna*, 528.

EVIDENCE—Continued.**10. To show purpose of loan.**

When money has been loaned to a member of a firm, evidence is admissible to show whether it was the understanding of the parties that the money was loaned to the firm or to the individual partner who obtained it. *Deland Minnig Co. v. Hanna*, 528.

11. Repetition of question to witness.

It is within the discretion of the trial Court to refuse to allow a question to a witness, which he has once clearly answered, to be repeated over and over again. *Garland v. State*, 83.

12. Declarations of third party.

Plaintiff bought a quantity of lumber from defendant under a contract which required it to be inspected according to certain specifications by the agent of a third party, for whose structure plaintiff was to use the lumber. *Held*, that evidence of this agent's declarations is not admissible in an action for breach of the contract since he was not the plaintiff's agent. *Canton Lumber Co. v. Liller*, 258.

13. Hypothetical question.

A hypothetical question put to a veterinary surgeon is erroneous when it assumes that healthy cattle were placed in pens separated from quarantine pens by one alley and a fence not absolutely tight, while the evidence shows that between the two pens there was another alley; and when the question also assumes that the cattle were reloaded from the yards upon cars other than those in which they were carried to it, while in fact they were reloaded in the same cars. *Balto. and Ohio R. Co. v. Derer*, 296.

14. What is not an hypothetical question.

The contractor who erected a building when a witness in his action to recover a balance claimed to be due may be asked the following question: "Can you state whether or not, based on your experience as a builder, this building was put up in accordance with the written specifications, plans and the contract?" This was not a hypothetical question to an expert having no actual knowledge of the facts and designed to elicit a mere opinion; and it was followed up by questions as to each provision of the contract. *Iron Clad Mfg. Co. v. Stanfield*, 360.

EVIDENCE—*Continued.***15. Hypothetical question as to stopping train.**

The following hypothetical question was put to an expert locomotive engineer: "From the observation of the track which you made and your familiarity with the Westinghouse system of air brakes, what would you say as to the possibility of stopping a train, such as that described by W. in his testimony, within the space of 250 yards?" *Held*, that this question was not proper, since it omits any reference to the speed at which, according to the evidence, the train was moving when a signal of danger was first seen by the engineer, and the speed of a train is the most material factor in the inquiry within what space it can be stopped. *N. C. Ry. Co. v. Green*, 487.

16. Expert testimony as to value.

The plaintiff in an action to recover for his work in constructing an electrical plant, who had testified that he had been an electrical contractor for many years; that he had installed nearly one hundred plants of the character of that referred to in this case, and that he had had occasion to value plants of that description, may be asked what in his judgment, founded upon that experience, was the fair value of the plant in question when he saw it in operation. *Rumsey v. Livers*, 546.

17. Opinion of witness.

In an action against a railway company to recover damages for having started a fire which burned over plaintiff's timber land, the evidence of practical lumbermen, who had examined the burned area, as to their estimates of the amount of the loss in dollars is inadmissible, since that is the opinion of experts as to the precise question which was to be determined by the jury. *Carter v. Md. and Pa. R. Co.*, 599.

18. To show that signed paper was not a contract.

Although parol evidence is not admissible to contradict or vary the terms of a written contract, yet it is admissible to show that what appears to be a written agreement was not intended as such by the parties. *Colonial Park Estates v. Masart*, 648.

19. When the question is whether a paper signed by the plaintiff was intended by the parties to be a binding contract, plaintiff

EVIDENCE—Continued.

may testify as to reasons given by the defendant for the signing of the paper. *Ibid.*

See CRIMINAL LAW.

DEPOSITIONS.

INSURANCE.

MASTER AND SERVANT.

NEGLIGENCE.

TRESPASS.

EXECUTIONS.

See INJUNCTIONS, 2.

EXECUTORS AND ADMINISTRATORS.**1. Waiver by executor of Statute of Limitations.**

An executor has the right to waive the defense of the Statute of Limitations against a claim so far as the personal property of the decedent is concerned, but he does not have that right as against the heirs or devisees of the real estate. *Houck v. Houck*, 122.

2. Promise by executor to pay claim adjudicated in favor of decedent.

An executor or administrator has no authority to bind the estate of the decedent by a promise to pay a claim which had been adjudicated in favor of the decedent in his lifetime. *Fledderman v. Fledderman*, 226.

3. Admissions by executor.

If an executor or administrator, after admitting that a claim against the estate of the decedent was one proper to be paid, discovers that the claim is such as ought not in justice to be charged on the estate, his previous admission of it does not preclude him from making the defense. *Fledderman v. Fledderman*, 226.

4. Dismissal by Orphans' Court of creditor's claim.

The fact that the Orphans' Court dismissed the petition of a party asking that a distribution account be set aside in order that the petitioner's claim as a creditor of the estate might be paid does not prevent such party from afterwards filing a bill in equity to enforce his claim. The determination of the Orphans' Court concerning claims against the estate of a decedent is not final. *Houck v. Houck*, 122.

EXECUTORS AND ADMINISTRATORS—*Continued.*5. Bill by creditor and legatee against executor and distributees—
Interest

A testator bequeathed the proceeds of an insurance policy to his son H. in trust for the benefit of the latter's son C., to be paid to C. upon his arrival at the age of twenty-one. The trustee H. collected the policy, mingled the proceeds with his own estate, and died leaving a will by which he gave all his property to his wife until C. reached the age of thirty, when he gave one-third of his estate to C. and the remaining two-thirds to his wife and another son. The executrix of the will, who was the wife of H., settled an account in the Orphans' Court by which she was allowed the whole balance of the estate. Some years afterwards, when C. reached the age of thirty, he filed a petition in the Orphans' Court, stating that he had never received the legacy given by the will of his grandfather, and asking that the account stated by the executrix of his father's will be set aside. The Orphans' Court dismissed this petition, and then C. filed a bill in equity asking that the property passing under the will of his father be sold for partition among the three legatees, and also that his claim as legatee under the will of his grandfather might be paid. *Held*, that C. is entitled, from the proceeds of sale, to the amount collected by H. on the policy, with interest thereon from the time of collection until he became twenty-one years of age. *Houck v. Houck*, 122.

6. *Held*, further, that no part of this interest from the time the estate of H. was distributed to his wife, should be charged against the share of the other son, but that the same should be deducted from the wife's share. *Ibid*.

7. *Held*, further, that the executrix of H. is entitled to receive from the proceeds of sale the amount of certain payments made by her on account of the estate and not allowed in the distribution account. *Ibid*.

FALSE ARREST.

See CARRIERS, 3.

FORMER RECOVERY.

See JUDGMENTS, 1, 3.

GUARDIAN AND WARD.

1. When guardian entitled to possession of legacy given as remainder to infant.

A testatrix bequeathed one-half of her estate to be held by a trustee, the income therefrom to be paid to her son for life, and after his death to his widow, and after her death the property to be divided equally between the children of the son, "each child to receive its share upon its arrival at the age of twenty-one years." The testator's son died, and then his widow, leaving an infant child. *Held*, that the guardian of the infant is now entitled to receive the property from the trustee under the will. *Strite v. Furst*, 101.

HIGHWAYS AND STREETS.

1. Assessment against abutting owner for paving private alley to abate nuisance—Right of appeal to City Court precluding resort to equity.

Ordinance No. 13 of Baltimore City, passed in October, 1905, provides that when a nuisance dangerous to health shall exist in any private street or alley, the City Engineer, acting upon a certificate of the Commissioner of Health, shall pave or repave the street or alley, and the cost thereof shall be collected from the owners of property fronting on the street. The ordinance also provides that before proceeding to pave, the City Engineer shall give ten days' notice by advertisement that he will ascertain the amount to be assessed and give an opportunity to those interested to show cause why the paving should not be done. It is also provided by ordinance that when the assessment has been made, the City Register shall give notice by advertisement that the assessments have been filed in his office and that the parties affected may appeal to the Baltimore City Court. In September, 1906, the Commissioner of Health notified the City Engineer that a nuisance existed in an alley (vacant land fronting on which was owned by the plaintiff), and that it was necessary to grade and pave the same in order to prevent the accumulation there of stagnant water. The city officials determined that it was necessary to construct a sewer before paving and the work of paving was therefore not done until December, 1907. In March, 1907, notice as to the paving required by said ordinance was given and the assessments were

HIGHWAYS AND STREETS—*Continued.*

made and transmitted to the City Register. The Register published notice that the assessment for paving in the alley in question, together with assessments in several other streets, had been made, and notified persons interested of their right to appeal to the City Court within thirty days. Plaintiff filed the bill in equity in this case alleging that the assessment against it was *ultra vires*; that the ordinance of 1905 was void because unreasonable; that the notice published by the City Register was defective, and prayed that the collection of the assessments be enjoined. *Held*, that it was not necessary for the city officials to await the construction of the sewer before determining that a nuisance existed in the alley, which would not be abated by the sewer, but that a paving of the alley would be necessary. *Owners' Realty Co. v. Baltimore City*, 477.

2. *Held*, further, that the ordinance of 1905, is a valid exercise of the power delegated to the city. *Ibid*.
3. *Held*, further, that whether the notice of the assessment against the plaintiff as published by the City Register was sufficiently definite in its description of the location of the alley to be paved or not, it was such notice as entitled the plaintiff to appeal to the City Court against the assessment, and since that remedy was given to him by statute, he is not entitled to resort to a Court of equity. *Ibid*.

INJUNCTIONS.

1. To restrain condemnation proceedings.

The question whether a corporation, seeking to condemn property for its use under an inquisition, is legally vested with the power of eminent domain may be raised under a bill for an injunction to restrain the condemnation proceedings. *Webster v. Susquehanna Pole Line Co.*, 416.

2. To restrain execution on judgments.

Plaintiff alleged that certain judgments rendered against him by Justices of the Peace had been rendered without his knowledge or consent, although purporting to have been made by confession; that certain other judgments entered against him by Justices and assigned to the defendant had been paid, and that the total amount of his real indebtedness to the judgment creditor was much less than the amount of the out-

INJUNCTIONS—*Continued.*

standing judgments. *Held*, that the evidence establishes most of the averments of the bill, and that the defendant should be enjoined from enforcing the judgments by execution upon payment by the plaintiff of a certain sum ascertained from the testimony to be the real amount of his indebtedness. *Horner v. Popplein*, 591.

INSURANCE.

1. Non-payment of premium causing life policy to become paid-up—Waiver of payment—Authority of agent.

A policy of endowment life insurance provided that if any premium after the first two insurance years is not duly paid, "this policy will automatically become a paid-up insurance" for the amount ascertainable in a specified manner, and also that "a grace of one month during which the policy remains in force will be allowed in payment of all premiums except the first." *Held*, that under these provisions the failure to pay a premium within one month after it became due reduced the policy in the manner designated unless the insurer waived such non-payment. *Crook v. N. Y. Life Ins. Co.*, 268.

2. The cashier of the local agency of a life insurance company, whose home office is in another State, has no authority to bind the company by waiving the non-payment of premium when due, if the policy provides that a waiver can be made only by certain designated officers. *Ibid.*

3. The acceptance by a local agent of payment of an overdue premium does not operate to waive a forfeiture of the policy on account of non-payment when due, unless the company knew or could have known what he had done, and adopted or ratified his act, or by its conduct estopped itself to insist upon a forfeiture. *Ibid.*

4. A life insurance policy provided that only the president, vice-president, actuary or secretary of the company had the power to modify the contract or to extend the time for paying any premium; that premiums might be paid to an agent producing receipts signed by one of these officers and countersigned by the agent; that if any premium be not paid within one month after it became due, the policy should become a paid-up policy for a reduced amount, according to a certain table. It also provided that the insured may secure reinstatement

INSURANCE—*Continued.*

of the policy at any time within five years after non-payment of a premium upon written application to the home office with evidence of insurability satisfactory to the company, and payment of premiums to date of reinstatement. A premium due under this policy on October 5th was not paid, and more than a month afterwards, *i. e.*, on November 7th, the local agent of the company notified the wife of the insured over the telephone that the policy had expired. The insured directed her to say that he would attend to it. To this the agent replied "all right," or "very well." On the same day the insured sent his check for the October premium. The agent sent in reply a receipt, stating that the amount would be held pending the consideration by the home office of an application for reinstatement of the policy, which by non-payment of the premium was not in force except as provided, and also asked for a medical health certificate, with a view to reinstatement of the policy. The insured did not furnish a health certificate, being at the time ill, and the premium so paid was returned to him by direction of the home office. On December 5th the insured died, and afterwards this action was brought to recover the full amount of the policy. *Held*, that under these circumstances there had been no waiver by the company of non-payment of premium when due, and the fact that the illness of the insured made it impossible for him to furnish the health certificate required for reinstatement did not relieve him from that condition. *Ibid.*

5. Tender and payment into Court—Interest.

In an action on a life insurance policy after it had become a reduced paid-up policy on account of non-payment of a premium, the defendant company filed a plea of tender and paid into Court the cash surrender value of the policy. Before forfeiture, the insured had obtained a loan from the company on the policy and paid interest thereon in advance. *Held*, that when this loan was extinguished, the proportion of interest thereafter unearned was a debt due by the company, and in this action the plaintiff is entitled, under the common counts, to recover that sum in addition to the surrender value of the policy. *Crook v. N. Y. Life Ins. Co.*, 268.

6. *Held*, further, that the plaintiff is entitled to interest on the sum due not from the death of the insured, but from the time

INSURANCE—Continued.

the proofs of death were filed, since under the policy the duty to pay did not arise until receipt of such proofs. *Ibid.*

7. Evidence in action on life insurance policy.

When the only issues made by the pleading in an action on a policy of life insurance are whether non-payment of a premium when due had been waived by the defendant or not, and whether such non-payment caused the policy to lapse, then evidence as to the physical condition of the insured when the policy was issued, or as to the difference between the policy sued on and other policies and as to similar matters, is irrelevant. *Crook v. N. Y. Life Ins. Co.*, 268.

8. Waiver of proof of loss in fire insurance.

The provisions in a policy of fire insurance restricting the power of agents to waive the conditions have reference to conditions that form a part of the contract, and do not refer to stipulations to be performed after a loss has occurred. *Bakhaus v. Caledonian Ins. Co.*, 676.

9. When statements made by an insurer to the insured after a loss induced the latter to believe that the formal proofs of loss mentioned in the policy would not be required of him, and acting upon that belief, he refrained from filing proofs of loss within the time limited by the policy for so doing, these circumstances constitute a waiver by the insurer of the formal proofs. *Ibid.*

10. Two days after a fire had destroyed certain buildings covered by policies of insurance, an agent of the insurer and its adjuster visited the premises, questioned the insured concerning the property and its destruction, at a subsequent interview further discussed the matter and directed the insured to make a statement under oath to the Fire Marshal, and then told the insured that he would hear from the adjuster. *Held*, that these facts are legally sufficient evidence to show that the conduct of the agent of the insurer induced the insured to believe that proofs of loss would not be required, and that the company would either settle the loss or deny all liability. *Ibid.*

11. Evidence.

Evidence that according to the general custom the insurance adjuster furnishes the insured with blank proofs of loss unless

INSURANCE—Continued.

he determines not to pay the same, is admissible in connection with other evidence as to the conduct of the insurer which induced the insured to believe that proofs of loss would not be required. *Bakhaus v. Caledonian Ins. Co.*, 676.

12. Waiver of condition as to ownership.

A policy of fire insurance was issued to A. alone, but it contained a rider or addition saying, "loss if any payable to the assured as interest may appear." The policy provided that it would be void, unless otherwise provided by agreement endorsed thereon, if the interest of the insured be other than unconditional and sole ownership, or if the interest of the insured be not truly stated. The property insured belonged to A. and his wife as tenants by the entireties, and there was a mortgage on it. *Held*, that the effect of making the loss payable to the insured as his interest may appear was to waive the conditions of the policy requiring the insured to be the sole owner and that his interest should be as stated. *Bakhaus v. Caledonian Ins. Co.*, 676.

13. Fire insurance—Waiver of condition as to vacancy.

At the time a policy of fire insurance on certain houses was issued, the buildings were not finished. That fact was then known to the agent of the insurer, and they were burned before completion. The policy contained a provision that it should be void if the building insured be or become vacant or unoccupied and so remain for ten days. Endorsed on the policy was permission to make alterations, additions and completions. *Held*, that the effect of this permission to complete the buildings was to waive the provision of the policy requiring the houses to be occupied and that condition would not apply until the houses were ready for occupancy. *Bakhaus v. Caledonian Ins. Co.*, 676.

14. Evidence in action on policy.

In an action on a policy of fire insurance, the plaintiff cannot be asked if he knew that formal proofs of loss were necessary. *Bakhaus v. Caledonian Ins. Co.*, 676.

15. Evidence that the plaintiff had knowledge, before consulting counsel, that the insurance company would refuse to pay his claim is immaterial. *Ibid.*

INTEREST.

See INSURANCE, 6.
PRACTICE, 2.

JUDICIAL SALES.

See MORTGAGES.
PARTITION.

JUDGMENTS AND DECREES.

1. Res judicata—Effect of decree dismissing bill.

A decree passed on bill, answer and pleadings may constitute as effective a bar to another suit for the same cause of action as a decree made after testimony taken. *Fledderman v. Fledderman*, 226.

2. But a decree dismissing a bill for want of prosecution, without prejudice, is not a bar to a new bill for the same cause. *Ibid.***3. When a decree dismisses a bill absolutely when it should have been dismissed without prejudice, the plaintiff has a right to appeal if he does not mean to acquiesce therein. *Ibid.*****4. Void magistrate's judgments.**

The entry of a judgment against a party, whether made in consequence of a mistake or of a misrepresentation as to his identity, is void if he was not served with process or did not confess the judgment. *Horner v. Popplein*, 591.

JUSTICE OF THE PEACE.

1. Irregularity in proceedings.

When the defendant in a suit instituted before a Justice of the Peace has been duly summoned, the Justice acquires jurisdiction which is not affected by a subsequent irregular proceeding, the remedy for that being by appeal. *Kent Bldg. Co. v. Middleton*, 10.

2. Jurisdiction—Invalid writ of summons—Appeal.

A suit was brought before a Justice of the Peace against a corporation, and the writ of summons was directed to "J. L., agent," and served on him. The Justice gave a judgment against the corporation, which did not appear before him. On appeal to the Circuit Court, the corporation filed a motion stating that it "objects to the trial of this case, and

JUSTICE OF THE PEACE—Continued.

asks that the appeal be dismissed upon the ground that the Justice of the Peace below was without jurisdiction to try the case." *Held*, that although a motion to quash the proceedings would have been more regular, yet this motion raised the question as to the validity of the summons, and was not a waiver by the corporation of its right to be summoned directly. *Smith Premier Co. v. Westcott*, 146.

3. When a Justice of the Peace renders a judgment against a party not summoned and over whom, therefore, he had no jurisdiction, the fact that that party appeals from the judgment is not a waiver of a summons or a consent to the jurisdiction. *Ibid*.

LANDLORD AND TENANT.

1. Landlord's claim as general creditor in distribution of assets of insolvent corporation.

When a corporation which, as lessee of property, had agreed to pay a certain rent for a short term of years, becomes insolvent and is placed in the hands of receivers, but not dissolved, the lessor is entitled to claim as a general creditor in the distribution of the assets of the corporation for the full amount of the rent accruing after the receivership and before distribution, when he has been unable to rent the premises during that time to other parties. *Woodland v. Wise*, 35.

LIMITATIONS AND LACHES.

1. Acknowledgment of debt.

When one of the parties entitled to an interest in an estate states to another that the latter will receive every cent of the legacy bequeathed to him for which the deceased owner of the estate was liable, that is a sufficient acknowledgment of the claim to remove the bar of the Statute of Limitations, as to the party making it. *Houck v. Houck*, 122.

2. Waiver of statute by executor.

An executor has the right to waive the defense of the Statute of Limitations against a claim so far as the personal property of the decedent is concerned, but he does not have that right as against the heirs or devisees of the real estate. *Houck v. Houck*, 122.

LIMITATIONS AND LACHES—Continued.**3. Laches in prosecution of suit.**

When the person to whose use certain magistrates' judgments were entered sought to enforce them, the judgment debtor, in November, 1904, filed a bill to restrain the execution. The defendant's amended answer was filed in March, 1908, and the cause was tried in August, 1909. *Held*, that there was not such laches in the prosecution of the suit as requires the dismissal of the bill. *Horner v. Popplein*, 591.

See EXECUTORS AND ADMINISTRATORS, 1.

MANDAMUS.**1. Construction of statute relating to sale of Maryland Reports by publisher under contract with the State.**

The Act of 1904, Chap. 327, requires the publisher to whom the contract for printing the Maryland Reports is awarded to sell the volumes to the public, either bound or unbound, at the respective rates therefor designated in his contract; but the Act contains no provision as to the number of copies of any volume that the publisher shall be required to sell to any one purchaser. The petitioner in this case, a law book dealer, alleged that the defendant had refused to supply him with 225 copies of a volume of the Maryland Reports published by the defendant under his contract with the State in pursuance of the said Act, and asked for a mandamus directing the defendant to supply him with said number of volumes. *Held*, that the statute does not clearly impose upon the defendant, as the contractor under the Act, the duty, not only to sell the Reports direct to the public at retail for the prices stipulated in his contract, but also to sell in wholesale quantities to other dealers to serve their independent trade, and that the petitioner is not entitled to the writ of mandamus asked for. *Curlander v. King*, 518.

MASTER AND SERVANT.**1. Finger of operator cut off by machine—Sufficiency of evidence of negligence.**

Plaintiff, a boy fourteen years old, was employed in defendant's machine shop to work on a machine called a reamer, which was used to cut small pieces out of pipes by means of blades attached to a revolving shaft. The plaintiff had been in-

MASTER AND SERVANT—*Continued.*

structed in the use of the machine and warned not to put his fingers in the vise holding the pipe while the reamer was in motion. It was not dangerous when properly operated. On the day of the accident, on account of which this action was brought, plaintiff was standing on some boards placed in front of the machine. These gave away and threw his weight on the treadle, and thus brought up the vise in which plaintiff's hand was caught and one of his fingers cut off. The defendant did not furnish the platform for the operation of the machine. It was not necessary for that purpose and the use of boards around the machine had been prohibited. *Held*, that the case was properly withdrawn from the jury, since there was no evidence of any negligence on the part of the defendant either in not furnishing proper appliances or a safe place for the work, or in not instructing the plaintiff as to the use of the machine and the danger attendant thereon, and also because the act of the plaintiff in standing upon the boards was an assumption of risk on his part. *McGee v. Cuyler*, 314.

2. Lineman on pole injured by breaking of cross-arm—Duty to inspect poles—Assumption of risk—Insufficient evidence of negligence.

When an employing corporation, owning poles carrying wires, has no independent system of inspection of the poles, cross-arms, steps, etc., and a lineman employed to work on such poles has no reason to believe that such inspection is made, he has no right to rely on the employer for inspection, but must himself make such tests as may be necessary to ascertain whether it is safe to go upon them, and cannot hold his employer responsible for injuries received by him by the giving away of such poles, or cross-arms, unless there was some defect in them when they were originally placed in position, or the employer had some knowledge of the defect which was not communicated to the lineman; provided the lineman is not such an inexperienced person as is entitled to be instructed as to the danger. *Consol. Gas Co. v. Chambers*, 324.

3. On a pole owned by a telephone company were strung the wires of an electric company and of a power company, the two latter companies being the defendants in this case. A cross-arm carrying wires of the power company was the lowest on

MASTER AND SERVANT—Continued.

the pole, and while the plaintiff was engaged in affixing above it a cross-arm for the electric company, he stood on that lowest cross-arm, which broke on account of dry rot on the inside and plaintiff fell to the ground and was injured. No evidence of any defect in the original construction of this cross-arm or in the wood of which it was made was offered. Plaintiff was an experienced lineman, and knew that it was not customary for the defendant to inspect the poles on which he was sent to work. He also knew that cross-arms sometimes break and he did not make use of the safety belt which he had with him. In an action against both companies to recover damages for the injury so occasioned, *held*, that the plaintiff's employer is not liable, since the plaintiff should have tested the cross-arm before putting his weight on it, and the injury was caused by a defect which he himself could have detected as well as the defendant, and which the defendant was not required to guard against by an independent inspection, and the risk was one which the plaintiff assumed as necessarily incident to the employment. *Ibid.*

4. *Held*, further, that the plaintiff is not entitled to recover against the power company, the owner of the cross-arm, since it was equally his duty to rely on his own inspection as against that company, and there is no evidence to show that it was aware of the defective condition of the cross-arm. *Ibid.*

MERGER.**1. Of leasehold estate in after-acquired fee.**

When the reversion in fee of a parcel of land is devised to, or vests in, the tenant for years of the land, holding in the same right, and there is no intervening estate, the term of years is merged in the inheritance, and the lease, with its covenants, ceases to exist. *Starr v. Starr M. P. Church*, 171.

MISTAKE.

See EQUITY, 1, 8.

MORTGAGES.**1. Redemption by third party—Tender.**

The purchaser at an execution sale of the equity of redemption of a mortgagor is entitled to redeem the mortgage, although

MORTGAGES—Continued.

the sheriff's deed conveying the equity to him may not have been recorded. *Kent Bldg. Co. v. Middleton*, 10.

2. An offer to redeem a mortgage with a tender of the amount due, although coupled with the request that the mortgage be assigned and not released, is an absolute and not a conditional tender. *Ibid.*
3. When a person who has an interest in the equity of redemption, or who is a lien creditor of the mortgagor, makes an unconditional tender to the mortgagee of the amount then due on the mortgage and costs, with a request for an assignment of the mortgage, it is the duty of the mortgagee to accept the money without insisting on a release of the mortgage, if there is any reason why it cannot be assigned. *Ibid.*
4. **Exception to sale.**

When a tender of the amount due on the mortgage has been made by a person authorized to redeem it, which tender is refused and the mortgage is foreclosed, such person is entitled to except to the ratification of the mortgage sale. *Kent Bldg. Co. v. Middleton*, 10.

5. **Exceptions to ratification of mortgage sale.**

One of the exceptions filed to the ratification of a mortgage sale alleged that a certain person had circulated false reports in the neighborhood to the effect that the title to the property was defective, in consequence of which intending purchasers were prevented from making bids at the sale. *Held*, that since there is no evidence that the title was in fact defective, or that any person was restrained from purchasing or bidding on the property on account of the alleged rumor, this exception affords no ground for vacating the sale. *McCarty v. Hamburger*, 40.

6. Another exception alleged that the sale was not fairly conducted and that the property was sold for an inadequate price. Upon an examination of the evidence, *held*, that the trustee making the sale acted throughout in good faith and fairly, with due regard to the interests of the mortgagor, and that the price for which the property was sold was not grossly inadequate. *Ibid.*

7. **Of property to be acquired in future.**

The owner of property may by a deed of trust in the nature of a mortgage subject it to a lien for the payment of future debts. *Diggs v. Fidelity and Deposit Co.*, 50.

MORTGAGES—Continued.

8. Corporations have the power to mortgage property to be acquired in the future, and in such case, as soon as the property is acquired by the mortgagor, the lien of the mortgage will be regarded in equity as fastening upon it. *Ibid.*
9. Estoppel of mortgagee to demand past interest from purchaser of equity or his assignee.

Property was conveyed by the mortgagor to A. upon the understanding that it would only be liable for interest on the mortgage from the date of the conveyance. The mortgagor gave to the mortgagee his promissory note for the amount of interest unpaid at the time of this transfer. After the transfer A. paid interest on the mortgage, and subsequently also the balance due on the purchase money to the mortgagor. The mortgagee had informed A. that a sum was due for unpaid interest, but afterwards and before A. paid all of the purchase money, the mortgagee told him that the matter had been adjusted. *Held*, that although the acceptance by the mortgagee of the promissory-note for the interest was not a payment thereof, and he did not intend to relinquish the lien of the mortgage as to the interest, yet since his conduct induced A. to pay for the property, supposing that the overdue interest was not a lien on it, the mortgagee is now estopped to enforce payment of the same as a lien under the mortgage. *Eareckson v. Rogers*, 160.

10. When the purchaser of property subject to a mortgage is entitled to the benefit of an estoppel against the mortgagee, that estoppel operates also in favor of the person to whom he conveys the property. *Ibid.*

See CORPORATIONS, 2, 3.

MUNICIPAL CORPORATIONS.

1. Police power of Baltimore City—Ordinance regulating removal of Garbage.

The Charter of Baltimore City empowers the Mayor and City Council to have and exercise within the limits of the city all power commonly known as the police power, to the same extent as the State could exercise the same within said limits, and also to pass such ordinances as it may deem expedient in maintaining the health and welfare of the city. An ordinance provided that no person except an employee of the city

MUNICIPAL CORPORATIONS—*Continued.*

should carry any garbage or other refuse through any streets without first obtaining a permit so to do from the Commissioner of Health, and the Commissioner was vested with discretion to grant and revoke such permits. *Held*, that this ordinance is a valid exercise of the police power vested in the city, since regulations concerning the removal of garbage and offal have a direct relation to the public health. *Schultz v. State*, 211.

2. The fact that a person indicted for a violation of this ordinance removed from hotels only scraps of animal and vegetable matter rejected as food, commonly called garbage, which he fed to hogs, and had invested money in the business of so raising hogs, does not exempt him from the operation of the ordinance, since much of this kind of matter is dangerous to the public health, and its removal may properly be made subject to public regulation, and all private business is subject to regulations designed to promote public health. *Ibid.*
3. **Liability for negligent failure to abate nuisance.**

In an action against a municipal corporation, the declaration alleged that it was the duty of the defendant to use reasonable care to keep the public streets and sidewalks of the city in a safe condition for public travel and to prevent and remove all nuisances therefrom; that, neglecting said duty, defendant did on a certain day and for a long time prior thereto, permit designated persons to stack beer kegs to a height of about eight feet on or near one of the public streets in such a negligent manner as to be dangerous to passers-by on that street; that on said day, while the infant plaintiff was passing along the street and using due care, one of the said beer kegs, so negligently stacked, fell upon her, causing injuries which necessitated the amputation of one of her legs. *Held*, upon demurrer, that this declaration states a good cause of action. *Havre de Grace v. Fletcher*, 562.

See COUNTIES.

HIGHWAYS AND STREETS.

NEGLECTENCE.

1. **Lineman on pole injured by breaking of cross-arm.**

On a pole owned by a telephone company were strung the wires of an electric company and of a power company, the two lat-

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NEGLIGENCE—*Continued.*

ter companies being the defendants in this case. A cross-arm carrying wires of the power company was the lowest on the pole, and while the plaintiff was engaged in affixing above it a cross-arm for the electric company, he stood on that lowest cross-arm, which broke on account of dry rot on the inside and plaintiff fell to the ground and was injured. No evidence of any defect in the original construction of this cross-arm or in the wood of which it was made was offered. Plaintiff was an experienced lineman, and knew that it was not customary for the defendant to inspect the poles on which he was sent to work. He also knew that cross-arms sometimes break and he did not make use of the safety belt which he had with him. In an action against both companies to recover damages for the injury so occasioned, *held*, that the plaintiff's employer is not liable, since the plaintiff should have tested the cross-arm before putting his weight on it, and the injury was caused by a defect which he himself could have detected as well as the defendant, and which the defendant was not required to guard against by an independent inspection, and the risk was one which the plaintiff assumed as necessarily incident to the employment. *Consol. Gas Co v. Chambers*, 324.

2. *Held*, further, that the plaintiff is not entitled to recover against the power company, the owner of the cross-arm, since it was equally his duty to rely on his own inspection as against that company, and there is no evidence to show that it was aware of the defective condition of the cross-arm. *Ibid.*

3. Action for injury caused by electric wire on a bridge—Evidence—Instructions to the jury.

When the question is whether an electric light wire, by contact with which the plaintiff was injured, was safely and properly located or not, evidence as to its condition some months after the injury is not admissible. *Annapolis Gas Co. v. Fredericks*, 449.

4. If an electric light wire was repaired after the plaintiff was injured by contact with it, and was afterwards taken down, evidence as to its condition at the time of the trial is not admissible to show that it was not properly insulated at the time of the accident. *Ibid.*

NEGLIGENCE—*Continued.*

5. Evidence as to the height of electric wires in a city or elsewhere is not admissible to show that a particular wire was not properly located on a certain bridge. *Ibid.*
6. When the plaintiff in an action against an electric light company alleged that one of its wires on a bridge was imperfectly insulated and sagged down, and that when passing on the bridge he came in contact with it and was injured; while the defendant alleged that the wire was placed beyond the reach of travellers on the bridge, and was safe, and that the plaintiff projected himself beyond the bridge, and so came in contact with it, a prayer offered by the plaintiff is erroneous when it refers in general terms to the place where plaintiff was injured as testified to by his witnesses, and which wholly ignores the testimony offered by the defendant. *Ibid.*
7. A prayer authorizing the plaintiff to recover damages for a permanent injury if the jury find he was permanently injured is not proper when there is no evidence in the case that his injury was permanent. *Ibid.*
8. Injury by train to horses fastened in trestle on railway track—
Contributory negligence of those in charge—Construction of Code, Art. 23, sec. 287, concerning injuries to cattle by railway companies.

Code, Art. 23, sec. 287, provides that railroad companies shall be responsible for injuries inflicted upon cattle, horses, etc., on their roads, unless said companies can prove that the injury was inflicted without any negligence on the part of the company or its agents. *Held*, that this statute applies to cattle, etc., estray on the railroad tracks or unattended, and does not apply to a case where horses become fastened in a trestle on the private right of way of a railroad and the injury is inflicted by a railroad train while the servants of the owner are present endeavoring to release the animals. If these servants fail to act with promptness in flagging the approaching train, this is contributory negligence which prevents a recovery or damages for the injury. *N. C. Ry. Co. v. Green*, 487.

9. A pair of horses belonging to the plaintiff ran away and going upon the track of the defendant railway company became fastened in a trestle, their bodies resting on the crossties and their legs hanging below. When plaintiff's servants, from whom the horses had run away, came up to the trestle, they,

NEGLIGENCE—Continued.

with some other persons near by, endeavored, unsuccessfully, to extricate the horses. One of these persons presently went up the track to stop a train which they thought would be approaching around a curve. He met the train, which was running at the rate of twenty-five miles an hour, about 250 yards above the trestle and signalled to the engineer. The latter at once applied the emergency brakes, but the train ran on a short distance over the trestle, killing one of the horses and injuring the other. In an action against the railway company the evidence on the part of the defendant was that the train could not have been stopped before reaching the trestle after the engineer saw the signal or the danger, and there was no competent evidence on the part of the plaintiff that it could have been so stopped. *Held*, that the case should not have been submitted to the jury, since there was no evidence of any negligence on the part of the defendant in failing to use due care to avoid the injury after getting knowledge of the danger, and also because the plaintiff's servants in charge of the horses were guilty of contributory negligence in not promptly giving notice to the engineer of the train, so that he could have had time to stop it before reaching the trestle. *Ibid*.

See CARRIERS.

MASTER AND SERVANT.

MUNICIPAL CORPORATIONS.

RAILROAD COMPANIES.

NUISANCE.

See COUNTIES, 1.

MUNICIPAL CORPORATIONS, 3.

OFFICE AND OFFICER.

See MANDAMUS, 1.

PARTNERSHIP.

1. Distribution of assets of insolvent partnership—Party entitled to share as creditor of firm.

Articles of partnership between A. and B. stipulated that B. should procure a loan of five thousand dollars, to be used as the capital of the firm, by causing the promissory note of

PARTNERSHIP—*Continued.*

the firm for that amount to be discounted and renewed for use in the business; that the note should be a partnership indebtedness, to be retired and paid out of the profits of the business as rapidly as could be done without impairing the capital, and that no division of the profits should be made until payment of the note. The endorser of the firm's note, who obtained its discount, agreed to do so in consideration of A.'s entering into the partnership with B. A few years afterwards the firm became insolvent, and upon a distribution of its assets in the hands of the receivers, exceptions were filed to the claim of the endorser who had paid the firm's note. *Held*, that under the agreement, the note was not to be paid exclusively from the profits of the firm's business, but that it created the relation of debtor and creditor between the firm and the endorser, and that the endorser is now entitled to share as a creditor in the distribution of the assets. *Porter v. Connolly*, 250.

2. Bill by one partner for account of profits derived from purchase and sale of land.

Plaintiff's bill in this case alleged that he and the defendant made an oral agreement to purchase and sell certain land and to purchase and sell timber and coal on other land and to share equally the profits and losses resulting from the transactions; that the lands were purchased and sold at a profit, the money having been received by the defendant; that the plaintiff and defendant were partners as to these transactions; that the defendant had failed and refused to account with the plaintiff or to pay him the share of the profits to which he was entitled. The answer of the defendant denied all the material averments of the bill. *Held*, upon an examination of the evidence that the plaintiff and defendant were partners as alleged in the bill, and that the plaintiff is entitled to one-half of the profits proved to have been derived from the sales of the land, less the reasonable expenses incurred by the defendant in effecting such sales. *Morgart v. Smouse*, 615.

3. Construction of an agreement for dissolution of partnership.

C. and S., partners, who were the lessees of a warehouse, filed a bill against the landlord claiming to be reimbursed for the expenses paid by them in taking down and rebuilding a part

PARTNERSHIP—Continued.

of the premises which had been condemned by the Inspector of Buildings. At the time of the rebuilding the partners erected certain fire shutters. Pending the decision of this case, the partnership was dissolved under an agreement by which C. paid to S. a sum of money for all his interest in the property of the firm, and S. assigned to C. his interest in the leased premises. It was agreed that all liability of the firm to the landlord under the pending case should be equally shared, and that all claims that might be recovered by the firm from him should be equally divided. It was finally decided in that case that the landlord was liable for all the expenses paid by the firm in rebuilding the warehouse except the cost of the fire shutters, which had been supplied with a view to the insurance on the property. *Held*, that S. had transferred all his interest in the fire shutters to C. under the agreement for dissolution, and now has no right to demand that C. should pay one-half of the cost thereof. *Stevens v. Clark*, 659.

See **CONTRACTS**, 14.

PARTITION.**1. Sale not decreed when land can be partitioned.**

Tenants in common of land are entitled to have partition or division of the same in kind; and it is only when the land cannot be divided without loss or injury that the Court is authorized under Code, Art. 16, sec. 129, to direct a sale of the property and division of the proceeds among the owners. *Rowe v. Gillelan*, 108.

- 2.** The bill in this case, filed by the owner of an undivided fourth interest in a tract of land containing about seventy-one acres against the defendants, one of whom owned two-fourths and the other one-fourth of the land, alleged that it could not be divided without loss or injury, and prayed for a sale of the property and a division of the proceeds among the parties according to their respective rights. The defendants alleged that the land could be divided not only without injury, but to the advantage of all concerned. *Held*, that the evidence shows, upon reference to the topography of the tract, that upon a partition each party would get an equal proportion of tillable land, woodland, hilly land, and each would have

PARTITION—*Continued.*

access to water, and that consequently the land should be partitioned, and not sold. *Ibid.*

3. Decree for partition under bill for sale.

When a bill prays for a sale of land and division of the proceeds among the owners thereof, and also for general relief, if the evidence shows that the land can be divided without loss or injury, the Court may decree that a partition be made under the prayer for general relief. *Rowe v. Gillelan*, 108.

4. Decree reserving rights of claimants to proceeds.

When a decree directing the sale of property is passed under an agreement which reserves to the parties the right to offer proof as to their claims against the property, the fact that the decree directs the sale to be made for the purpose of partition does not preclude a party from asserting an independent claim against the proceeds as a creditor of the deceased owner. *Houck v. Houck*, 122.

**5. Decree for sale upon admissions in cause without testimony—
Marketability of title.**

Code, Art. 16, sec. 129, authorizes Courts of Equity to decree a partition of land owned in common upon the bill of any concurrent owner, or, if it appear that the lands cannot be divided without loss or injury to the parties interested, the Court may decree a sale for the purpose of dividing the proceeds among them. The bill in this case alleged that certain lands owned by a deceased intestate descended to the plaintiffs and defendants, his only heirs at law, and that a sale of them was necessary for the purpose of partition. The defendants, who, as well as the plaintiffs, were of full age, answered, admitting the allegations of the bill, and a decree was passed directing a sale. No testimony was taken in support of the averments of the bill. Upon exception to the ratification of the sale by the purchaser of part of the land, *held*, that the allegations in the bill were sufficient to give the Court jurisdiction, and that the absence of evidence to support these allegations, which were admitted, does not affect the validity of the decree, and that consequently the circumstance that no testimony was taken to prove such admitted facts is no ground for vacating the sale. *Scarlett v. Robinson*, 202.

6. Held, further, that such absence of testimony does not affect the marketability of the title to the land acquired by the pur-

PARTITION—Continued.

chaser, since, in a case like this, the Court sells only the title of the parties to the suit, and even if there had been testimony to show that the parties to the cause were the exclusive owners of the property, the decree would not have been binding upon persons not represented, who did in fact have interests in the property, and there is no allegation that any such interests in the property existed. *Ibid.*

PERJURY.

See **CRIMINAL LAW**, 17.

PERPETUITIES.

See **DEVISE AND LEGACY**, 3, 4.

PLEADING.**1. In action against carrier for exposing cattle to disease.**

A declaration charging that the defendant carrier, a railroad company, negligently permitted the cars in which it transported cattle for the plaintiff, and the pens and yards in which the cattle were fed, to become dirty and infected with germs of disease by which the cattle became infected, is sufficiently definite, and a demurrer thereto was properly overruled. *Balto. and Ohio R. Co. v. Dever*, 296.

2. A plea to such declaration averring that the claim of the plaintiff was based on regulations promulgated under an Act of Congress concerning the shipment of cattle, and that said Act is unconstitutional, is bad on demurrer, since the declaration is based not on the Act of Congress, but on the common law rights and liabilities of the parties. *Ibid.*

3. Bill of particulars.

Where a bill of particulars was not filed by the plaintiff in a cause until after the defendant had demurred to the declaration, the bill of particulars is not to be considered in passing on the demurrer. *Anne Arundel County v. Watts*, 353.

4. Declaration in action against municipal corporation for negligence.

In an action against a municipal corporation, the declaration alleged that it was the duty of the defendant to use reasonable care to keep the public streets and sidewalks of the city

PLEADING—Continued.

in a safe condition for public travel and to prevent and remove all nuisances therefrom; that, neglecting said duty, defendant did on a certain day and for a long time prior thereto, permit designated persons to stack beer kegs to a height of about eight feet on or near one of the public streets in such a negligent manner as to be dangerous to passers-by on that street; that on said day, while the infant plaintiff was passing along the street and using due care, one of the said beer kegs, so negligently stacked, fell upon her, causing injuries which necessitated the amputation of one of her legs. *Held*, upon demurrer, that this declaration states a good cause of action. *Havre de Grace v. Fletcher*, 562.

5. Amendment after demurrer.

When a demurrer to a plea or replication is sustained, but the pleader gets the full benefit of his defense or reply by an amended plea or replication, he is not prejudiced by the ruling on the demurrer, even if the Court erred. *Bakhaus v. Caledonian Ins Co.*, 676.

POLICE POWER.

See MUNICIPAL CORPORATIONS, 1.

PRACTICE.**1. Repugnancy between granted prayers.**

When the question is whether a quantity of lumber, which was sold as being in conformity with certain specifications, was rejected by the inspectors because not in conformity with those specifications, or because not in accordance with the inspectors' view of its fitness apart from the specifications, a prayer instructing the jury that there is no evidence of fraud or bad faith on the part of the inspectors is not in conflict, so as to mislead the jury, with another prayer, instructing them that the inspection should have been made, not in accordance with the inspectors' view of the fitness of the lumber for the purpose in hand, but in accordance with the specifications. *Canton Lumber Co. v. Liller*, 258.

2. Verdict for principal sum with interest.

When a plaintiff is entitled to a sum of money with interest thereon from a certain date, the verdict of the jury should be

PRACTICE—Continued.

for the total of the principal sum with interest added to the day of trial, and not for the principal sum with interest. *Weant v. Southern Trust Co.*, 463.

3. Explanation by trial Court of instruction.

The trial Court has the right at any time to explain to the jury the legal effect of instructions granted. *Weant v. Southern Trust Co.*, 463.

4. Consolidation of actions.

When two different policies of fire insurance are issued by the same company on adjoining properties destroyed by the same fire, and two actions are brought on the policies, the Court may order the cases to be consolidated by virtue of Code. Art. 50, sec. 8. *Bakhaus v. Caledonian Ins. Co.*, 676.

PRINCIPAL AND SURETY.

See EQUITY, 8

PRINTER.

See MANDAMUS, 1.

RAILROAD COMPANIES.**1. Covenant by railway company to maintain siding on cove-
nantee's land not perpetual—Substantial compliance.**

A contract providing that a railway company shall maintain a station for passengers at a certain place is substantially complied with by the construction and maintenance of a station there for a number of years. Such a contract does not bind the company to keep a station forever at that place. *Whalen v. Balto. and Ohio R. Co.*, 187.

2. A railroad company covenanted with a landowner and his assigns to construct and maintain a turnout and siding at a certain point on the land and there take up and set down passengers and freight. The company maintained the siding for nearly sixty years, when the exigencies of its business required a different location of its tracks to be made and the siding was abandoned. In an action for breach of the covenant, *held*, that in view of the fact that the covenant does not provide for the maintenance in perpetuity of the services in question, and of the fact that they were main-

RAILROAD COMPANIES—Continued.

tained for many years, and in view of the circumstances which caused their abandonment, there has been no breach of the covenant and the plaintiff is not entitled to recover. *Ibid.*

3. Injury by train to horses on track.

Code, Art. 23, sec. 287, provides that railroad companies shall be responsible for injuries inflicted upon cattle, horses, etc., on their roads, unless said companies can prove that the injury was inflicted without any negligence on the part of the company or its agents. *Held*, that this statute applies to cattle, etc., estray on the railroad tracks or unattended, and does not apply to a case where horses become fastened in a trestle on the private right of way of a railroad and the injury is inflicted by a railroad train while the servants of the owner are present endeavoring to release the animals. If these servants fail to act with promptness in flagging the approaching train, this is contributory negligence which prevents a recovery or damages for the injury. *N. C. Ry. Co. v. Green*, 487.

4. Liability for setting fire to timber land—Damages.

If a railway company negligently permits sedge grass and other material likely to be ignited by sparks from locomotives to remain on its right of way, and this material is set on fire by a passing engine, and the fire is communicated to adjoining property as a natural and direct consequence, the railway company is liable therefor, although it was not negligent in the management of the engine. *Carter v. Md. and Pa. R. Co.*, 599.

5. In an action against a railway company for negligently setting on fire plaintiff's timber land, he is entitled to recover, in addition to the damage to the timber and fences, the value of certain posts and rails piled on the land which were in his possession. *Ibid.*

See ASSAULT, 1.

CARRIERS.

RECEIVERS.

1. Landlord's claim as general creditor in distribution of assets of insolvent corporation.

When a corporation which, as lessee of property, had agreed to pay a certain rent for a short term of years, becomes insol-

RECEIVERS—Continued.

vent and is placed in the hands of receivers, but not dissolved, the lessor is entitled to claim as a general creditor in the distribution of the assets of the corporation for the full amount of the rent accruing after the receivership and before distribution, when he has been unable to rent the premises during that time to other parties. *Woodland v. Wise*, 35.

2. When not to be appointed without notice.

A bill filed by a creditor of a corporation alleged that it was insolvent; that its property was in danger of distraint for non-payment of rent; that suits at law and attachments were threatened against it, and asked for the appointment of a receiver. No proof was offered in support of the averments of the bill and no evidences of debt were filed to show that the plaintiff was a creditor of the company. *Held*, that upon this bill a receiver should not be appointed without notice to the corporation and without a hearing, since it is not made to appear that there is imminent danger of loss and injury unless immediate possession of the property be taken by the Court. *Balto. Skate Mfg. Co. v. Randall*, 411.

RECOUPMENT.

See **CONTRACTS**, 2.

RELIGIOUS SOCIETIES.**1. Construction of charter of church—Power to sell property.**

The provision in the charter of a church corporation that it should hold certain leasehold property about to be demised to it on certain conditions is not applicable when the church afterwards acquires the fee in the property. *Starr v. Starr M. P. Church*, 171.

2. A provision in the charter of a church corporation that it shall not have power to mortgage its property does not operate to prevent a sale of the property in case it should become necessary to sell in the interest of the church. *Ibid*.

3. The rule that words in a grant or devise indicating the use to which the property conveyed is to be applied do not of themselves create a condition, is applicable in the construction of the charter of a church, in relation to a statement of the purposes for which property given to it shall be used. *Ibid*.

REPORTS OF COURT OF APPEALS.

See MANDAMUS, 1.

SALES.

1. Warranty of soundness.

The warranty of soundness of an article sold relates to its condition at the time of delivery or transfer of title. *American Syrup Co. v. Roberts*, 18.

2. A written contract provided for the sale by the defendant in Baltimore to the plaintiff in Nashville, Tenn., of a quantity of tin cans, to be shipped in April and May, f. o. b. Baltimore, sight draft against bill of lading, "usual guarantee against leaks not to exceed two to the thousand." Plaintiff alleged in this action that many of the cans so bought and paid for were leaky and worthless and brought this action to recover damages therefor. His evidence showed that the use of the cans did not begin until sixty or ninety days after their receipt. *Held*, that under the contract the place of delivery of the cans was Baltimore; that the warranty of soundness related to their condition at the place and time of delivery, and that the jury was properly instructed that the defendant was only bound to deliver the cans to the plaintiff f. o. b. cars Baltimore, free of leaks exceeding two cans to each thousand, and unless from the evidence the jury found that the defendant did not so deliver the said cans, then the plaintiff is not entitled to recover. *Ibid*.

3. Failure of seller to deliver part of the goods demanded—Action for damages after waiver of right to rescind—Demand for delivery—Instructions.

When a contract requires the seller to deliver goods as demanded during a certain period of time, and he fails or refuses to make a delivery as requested, thus giving to the buyer the right to rescind the contract, then, if the buyer afterwards demands and receives other goods, he may be held to have waived his right to rescind the contract. But by thus waiving his right to rescind, the buyer does not waive his right to claim damages for the breach by the seller's failure to make the prior delivery as demanded. *Sumwalt Ice Co. v. Knickerbocker Co.*, 437.

4. Thus, where a buyer was entitled to demand 600 tons of ice each week during a certain period, and the seller refused or

SALES—*Continued.*

was unable to deliver more than 300 tons, the buyer, merely by accepting the 300 tons, does not waive his right to the stipulated amount, and is not prevented from afterwards recovering damages for the failure of the seller to deliver that amount. *Ibid.*

5. The defendant, an ice company, agreed to sell and deliver to the plaintiff such quantities of ice as the plaintiff might require during two years at designated prices. The plaintiff agreed to take not less than 6,000 tons in the first year, but it was stipulated that the defendant should not be required to deliver more than 12,000 tons in each year, or more than 600 tons in each week. Before the expiration of the time limited for the duration of the contract, the plaintiff brought this action to recover damages, alleging that the defendant had failed to deliver the stipulated number of tons, although the plaintiff had demanded the same at certain times. After the institution of the action, the plaintiff continued to take ice from the defendant under the contract. *Held*, that it was necessary for the plaintiff, under the terms of this agreement, to make demand or give notice to the defendant of the quantity of ice required each week. *Ibid.*
6. *Held*, further, that an instruction is erroneous which declares that if the plaintiff made a demand for ice as required, but that afterwards, either upon the request of the defendant or upon its protest that the furnishing of such ice was not within the terms of the contract, the said demand was waived, then the same may be treated as never having been made. This instruction fails to state what was necessary to constitute a waiver or what agent of the plaintiff was authorized to waive the demand. *Ibid.*
7. *Held*, further, that a mere request by the defendant that the plaintiff should sell as little ice as possible consistent with his engagements, was not a refusal by the defendant to furnish ice under the terms of the contract, and did not relieve the plaintiff from the necessity of making a demand for the quantity of ice required. *Ibid.*
8. **Of goods by sample.**

In an action to recover the price of goods which were sold by sample a prayer is erroneous which declares that the plaintiff is entitled to recover the price without requiring the jury to

SALES—Continued.

find that the goods delivered were equal to the sample. *Deland Mining Co. v. Hanna*, 528.

9. Recoupment in action for price.

The buyer, in an action against him for the price of goods sold, is not entitled to have the jury instructed that an allowance should be made to him for the return of empty bags which had contained the goods, when there is no evidence in the case that any bags had been returned to the seller. *Deland Mining Co. v. Hanna*, 528.

- 10.** When the only evidence in the case is to the effect that the difference between the price of goods of the quality ordered and the price of goods of an inferior quality which were delivered was a certain sum, a prayer allowing the jury to deduct a larger sum from the seller's claim is erroneous. *Ibid.*

SEVERANCE.

See **APPEAL**, 8.

TENDER.**1. By check.**

When a tender made in the form of a check on a bank is refused, not because so made but on other grounds, the creditor waives his right to have the tender made in lawful money. *Kent Bldg. Co. v. Middleton*, 10.

See **INSURANCE**, 5.

MORTGAGES, 2.

TRESPASS.**1. Evidence to show boundary of land.**

A deed described the land conveyed as being tracts having certain names and as containing a designated number of acres. A part of the land was unenclosed woodland. In an action of trespass *q. c. f.* the grantee testified that he exercised acts of ownership over certain land as belonging to the farm conveyed under his deed. Another witness who lived in the neighborhood and had known the land for more than fifty years, testified that a certain line marked one of its boundaries, and that this had been pointed out to him as such forty years previously by a former owner of the tract; and another

TRESPASS—Continued.

witness, who had been acquainted with the land for thirty years, testified to the same effect. *Held*, that this evidence, documentary and oral, is legally sufficient to show that the plaintiff had such possession of the land as entitled him to maintain the action. *Carter v. Md. and Pa. R. Co.*, 599.

2. Constructive possession.

It is not necessary for the plaintiff in an action of trespass *q. c. f.* to show either an actual possession of the land under a paper title or an adverse one in the strict sense of that term, but a constructive possession will be sufficient. This is especially true when the action is against a tortfeasor setting up no claim of title in himself to the land. *Carter v. Md. and Pa. R. Co.*, 599.

3. Evidence of title in third party.

In an action against a railway company to recover damages for the burning of timber, fencing, etc., on plaintiff's farm by a fire started by sparks from a passing locomotive, the plaintiff offered in evidence a deed and a survey showing that forty-two acres of land belonging to him had been so burned over, while, according to the survey made by the defendant, only about twenty-nine acres of the land burned over were owned by the plaintiff. The defendant also offered in evidence two deeds made in 1805, conveying a part of the burned-over timber land to persons other than those under whom plaintiff claimed. *Held*, that this evidence is not admissible to show that the plaintiff did not own the land he claimed, since the deeds merely showed that at the time of their execution such conveyances had been made, and is not accompanied by evidence to show that at the time of the fire the title to that part of the land was not in the plaintiff. *Carter v. Md. and Pa. R. Co.*, 599.

4. In an action of trespass by the plaintiff in actual possession of land against a wrongdoer, the defendant cannot set up in bar of the action or in mitigation of damages, that the title to the land was in a third party under whom the defendant does not claim. *Ibid.*

5. Ancient plat.

A plat of a tract of land is not admissible in evidence to prove boundaries when unaccompanied by any evidence as to who made it, or when it was made, or as to its correctness. *Carter v. Md. and Pa. R. Co.*, 599.

TROVER.

See CONTRACTS, 13.

TRUSTS AND TRUSTEES.

1. Parties to bill to construe deed of trust.

When a trustee applies to a Court of Equity to construe the instrument creating the trust and to give directions as to its execution, persons *in esse* whose rights may be affected by the Court's action, must be made parties to the suit in person or by representation in order to bind them by the decree made therein. *Diggs v. Fidelity and Deposit Co.*, 50.

2. Liability of trustee under mortgage to secure bonds.

When a trust company has by mistake of law improperly certified that certain bonds were secured by a mortgage to it, as trustee, it is protected from liability therefor if the mortgage provides that the trustee shall not be answerable except for wilful default. *Diggs v. Fidelity and Deposit Co.*, 50.

3. Borrowed money used in purchase of land—Resulting trust.

A resulting trust is not created by the circumstance that the borrower of a sum of money used it in part payment for a parcel of land purchased in his own name, although the lender was of the opinion that he would have an equitable lien on the land for the repayment of the loan, when there was no representation or promise by the borrower to that effect. *Euler v. Schroeder*, 155.

VENDOR AND PURCHASER.

1. Sale by heir or devisee—Debts of deceased owner.

The point of time after which the heir or devisee may sell the land to a *bona fide* purchaser without incurring the risk of having the latter afterwards made liable for the payment of the ancestor's debts, is when the records of the Orphans' Court show a final settlement of the personal estate, indicating that all proved debts have been paid in full, and that there is still a balance in the hands of the executor or administrator. *Scarlett v. Robinson*, 202.

2. Adverse possession of alley—Title free from reasonable doubt.

A private alley once passed through a lot of ground, but for the last fifty years the alley has been built over and occupied

VENDOR AND PURCHASER—Continued.

exclusively by the plaintiff, as the owner of the lot and his predecessors in title. *Held*, that under these circumstances the plaintiff has such a title by adverse possession to the alley that a purchaser of the lot, including the alley, will be compelled to accept the title under a bill for specific performance, since it is free from reasonable doubt. *Arey v. Baer*, 541.

3. *Held*, further, that even if the alley had once been a public alley, the circumstances of the case would create an estoppel against the public to assert a right to its use. *Ibid*.
4. **Memorandum of contract of sale—Action to recover money paid on account of purchase price.**

Plaintiff, upon making an oral agreement to purchase certain lots of ground, asked to see the kind of contract he would be required to sign, and the vendor showed him a certain printed blank form of contract. After reading it he expressed his satisfaction and paid \$250 demanded as the first payment. At the request of the vendor, he signed a paper containing a reference to the numbers of the lots in question and the direction to have the deed made in his own name. Subsequently he was asked to sign a form of contract for the purchase containing provisions materially different from those contained in the printed form exhibited to him. This he refused to do and brought this action to recover the sum so paid. *Held*, that if these facts are found by the jury, the paper so signed by the plaintiff is not a sufficient memorandum of the contract of sale under the Statute of Frauds, and he is entitled to recover back the money so paid by him. *Colonial Park Estates v. Massart*, 648.

5. If the vendor and the purchaser agree to rescind their contract for the sale of land, the purchaser is entitled to recover a sum of money paid by him on account of the price. *Ibid*.

WAIVER.

1. **Instructions to the jury concerning.**

In determining whether there has been a waiver or not it generally happens that there are facts which must be submitted to the jury, but the Court should instruct them as to the legal effect of their finding such facts. *Sumwalt Ice Co. v. Knickerbocker Co.*, 437.

WAIVER—*Continued.*

2. When the question of waiver *vel non* depends upon the evidence in the case, it is error to leave to the jury the broad question whether there was a waiver, without any indication of the particular facts they must find in order to infer a waiver. *Ibid.*

See **INSURANCE.**

SALES, 3.

WILLS.

See **DEVISE AND LEGACY.**

EXECUTORS AND ADMINISTRATORS.

WITNESS.

1. **Competency—Other party to transaction dead.**

When a party to a cause is incompetent to testify as a witness to transactions had with a decedent, that part of his testimony which leads up to, or is in explanation of, his testimony as to such transaction, is likewise inadmissible. *Worthington v. Worthington*, 135.

See **EVIDENCE.**

WRITS.

1. **Summons in action against corporation.**

In an action against a corporation, the writ of summons must be directed to it, and not to an officer or agent, although service must be made upon an officer or agent. Under a summons against "J. L., agent," without more, no jurisdiction is acquired under which a valid judgment can be rendered against the corporation of which he is an agent. *Smith Premier Co. v. Westcott*, 146.

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